Supreme Court, U.S.
FILED

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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1995

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, et al.,

Petitioners,

- against -

HAROLD YOURMAN, et al., etc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions that also are presented in Auer v. Robbins, No. 95-897, in which this Court granted the petition for a writ of certiorari on June 24, 1996, and Wisconsin v. Mueller, No. 95-586, in which a petition for a writ of certiorari is pending. All three cases are challenges by employees of a State or local government to their employers' view that they are exempt from the provisions of the federal Fair Labor Standards Act ("FLSA") because they are executive or administrative employees, 29 USC section 213(a)(1). The employees argue that they do not satisfy the "salary basis test" for exemption set forth in regulations of the Department of Labor ("DOL"), 29 CFR section 541.118.

1. Is the salary basis test, as applied to state and local government employers, arbitrary and capricious, because it is irrational and absolutely contrary to Congress's intent, and therefore void under the Administrative Procedure Act ("APA")? This issue would be presented if the petition in Wisconsin v. Mueller were granted.

2. Is the salary basis test a "regulation" of the Department of Labor or a mere "interpretation" so that it is entitled to deference only to the extent that it is persuasive? This issue also is relevant to Auer v. Robbins and Wisconsin v. Mueller.

3. Is the DOL's application of the salary basis test to state and local government employees violative of the tenth amendment, because it is the result of a failure of the national political process, or if not should the salary basis test be interpreted to avoid a conflict between the FLSA and the tenth amendment? The first of these questions also is raised by the petition in Wisconsin v. Mueller.

4. Is the salary basis test violated, so that employees in question are not exempt, when the employees are merely subject to the theoretical possibility of salary deductions

that would violate the salary basis test, or must actual deductions, violative of the test, occur before an employee loses exempt status? This question also is raised by the petition in Auer v. Robbins.

5. If deductions impermissible under the salary basis test occur but are infrequent: (a) is the regulations' "window of correction" available so that the exemption is not lost and if not (b) is the exemption lost only for the employee in question and only for the work-week in which the impermisslbe deduction is made? Part (a) of this question is raised in the petition in Auer v. Robbins.

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PARTIES TO THIS PROCEEDING

Petitioners are Rudolph W. Giuliani, Mayor of the City of New York; The Board of Education of the City School District of the City of New York; and the New York City Health and Hospitals Corporation, a separately incorporated public benefit corporation. There are over 430 respondents; each is a natural individual. They are: Yvette Wynne, Mary White, Ellen Wilson, Phyllis Williams, Harriett Williams, Ethel Wells, Mary Walton, Eduardo Vidal, Antonio Turrigiano, Esther Turnbull, Norman Trosten, Karl Trachte, Notre Thomas, N. Lael Telfeyan, Kathryn Tate, Deborah Taitt, Elbert Sweat, Sharon K. Summerville, Arlene Stringer, Charles Sternberg, Rea Stein, Neila Spence-Reid, Stephen Smith, Patrick Smith, Patricia Smith, Mary Shower, Michael Shady, Joseph Sepulveda, Florence Schulman, Joanne Schoonmaker, Barbara Schoen, Lenore Schlossberg, Raymond Saes, Herbert Rosenblum, Louis Romasco, Philip Rigaud, Camille Ranieri, Joyce Prever, Rhoda Poblet, Peter Peta, Arnold Pessin, June Nearon, Marilyn Mungen, Lucy Mueller, Robert Moss, Beverly Moran, Marilyn Moch, Irving Mittenberg, John Milioti, Yvonne Mccoy, Roberta Mcbride, Harriet Mannheim, Gerald Maguire, Carol Lyttle, Martin Levine, Michael Lessinger, Inez Lambert, Lawrence Konstan, John Kelly, Marsha Kellam, Anita Kasen,Yvonne Jones, William Jones, Laura Jones, Barbara Howard, Katherine Holley, Morris Heney, Lillian Heard, Thomas Hargrove, Mattie Harris, Jeanette Greaves, Robin Goodstein, David Goldstein, John Gargano, Joan Frimmer, Linda Freeman, Raymond Frasene, Anita Folkerth, Gloria Ferreras, Stephen Ferrer, William Ferrante, Richard Fenton, Evelyn Felix, Anne Eskridge, Eileen Erickson, Edward Ellis, Stuart Eber, Peter Early, William Dworkin, Marcella Doswell, Joseph Donini, Rickey Dennis, Dennis Deering, Elizabeth Daversa, Anthony Curry, Anthony Curcio, Dominick Cucinotta, Juanita Copes, Nereida Cintron, Carmen Ceriobelle, Sharyn Brown, Brenda Brown, Christene Brock, Sandra Bounty, Louis Bongiovi, Martin Bokser, Elaine Blumpkin, Anita Bloom, Thelma Blash, Howard Beedles, Ruth Barrentine, Dorothy Alicea, Philip Aldridge, Lawrence Weintraub, Ted Weg, Louis Sommo, Walter Romm, Milton Peek, Robert Pardi, Elizabeth Lane, Patricia Kushner, Alfred Goldman, Frederick Ewald, Calvin Evelyn, Sam Eiseman, Joseph Anastasio,

James Ahern, Irene Prager, Robert Losada, Robert Kares, Efron Hyman, Henry Eisig, Richard Baxt, Sam Galen, Martin Oesterreich, Thomas Sweetman, Walter Mccarthy, Richard Lang, Joseph Higgins, Donald Forster, Joseph Degeorge, Thomas Clarke, John Cashin, Richard Breuninger, Albert Alias, Felice Sicuranza, Robert Naeder, Connie Morrison, William Miller, Frank Meyer, Walter Mead, Michael Mcnamara, Michael Lamonica, Leonardo Ingravallo, Julius Hardaway, Frank Garrison, Frederick Frenz, Susan Downey, Edmond Digiulio, Jerome Demers, Steve Austen, Robert Valinotti, Calvin Thorbourne, Jospeh Taffaro, Herbert Siegel, Henry Serino, Alfred Schmidt, Peter Lusardi, Perry Lindsay, Thoedore Klopsis, Lee Kerbel, Angelo Guzman, Earl Evans, Edward Coffey, Vito Catalano, Bernard Browne, Louise Becton, Juanita Arsenic, Arthur Wrubel, Louis Soccoa, Raymond Schaeffer, Jorge Santos, Richard Matarangelo, Jerome Liebowitz, Frederic Levine, Robert Jean, Janie Jacobs, John Hendrickson, Norine Enrione, Lawrence Berman, Jessie Barringer, Jack Zimmardo, James Wynne, Roy Westbrook, Richard Vela, Joseph Timpone, Charles Thompson, Paul Stolz, Paul W. Stevenson, Adolph Stampfel, John Smith, Aristide Siegel, Louis Scalzo, Philip Saglimbene, Rocco Sabatella, Sam Russo, Paul Rupp, John Rowell, Michael Roselle, Foster Romano, Carl Ranieri, Albert Rahner, Anthony N. Punzi, Carmine Procida, Bartholomew Porpora, Rocco Panico, Vincent Palazzola, John Oliviero, James Moss, Gregory R. Morris, John Moran, Peter Montalbano, Walter Mitchell, John Mezzacapo, John Melidones, James Mccabe, Mario Mauro, Gerald Manza, Richard Mancuso, Thomas Maher, Jack Lorenzo, William Lonergan, Anthony Lofaso, Harold Levin, Alexander Leiter, Charles Leal, Robert Lanzone, Francis Landers, Joseph Lanaro, Richard Krepela, Richard Koch, Peter Kelly, Julian Jackson, Charles Irwin, Patrick Hurley, Jonah Holley, Maurice Hogan, Pedro Hernandez, Donald Harris, Charles Guinan, Sydney Glassberg, Thomas Gibney, John Genco, Joseph Galarza, Frank C. Fox, John Fogg, Albert Fitton, Robert Ferrieri, Jack Farley, Louis Etergineoso, Anthony Etergineoso, Carl Dulisse, William Dolan, Theodore Digilio, John Devaney, Vincent Degennaro, Frank Capabianco, Werner Dangel, Stephen Congelosi, Joseph Cocozza, William Cloke, Dennis Cleary, Anthony Ciuffini, Philip Ciocci, Benedict Cecere, George Caulfield, Robert Callahan, Norman Butler,

Michael Burke, John Brady, George Bossert, Richard Black, Frank Beggs, Joseph Barsalona, Sam J Baglino, John Ardizone, James Ardizone, Paul Arcabasso, Charles Anastasia, Joseph Angelo, Corratta Walker, Beverly Session, Deborah Duvdevani, Frederick D'alo, Donald Williams, Gladys Schlanger, Lawrence Mcdevitt, Margery Manley, Thomas Kaiser, Allan Goldberg, Scott Bertram, Peter Abatangelo, Harold Yourman, Richard Okolsky, Frank Mastandrea, Michael Kane, Jay Gingold, Paul Zoltanetsky, Herbert Tschudi, Janis Skinkis, Lawrence Scheiber, Herman Rosen, Joseph Ramaglia, Norman Padnos, Frank Oliveri, Joseph Miller, Rose Mikaelian, Norman Melbinger, Joseph Mcguire, Jack Ledger, Paul Krasnoff, Ramakrishnared Isanaka, Thomas J. Hook, Michael Greenberg, Stanley Goldstein, Edward Gitkind, Jack Feinstein, Benedetto Fargione, Roy Durig, John Donnellon, Devji Dhebariya, Richard Deraris, Mateo Decardenas, Jose M. Castano, Joseph P. Cassidy, Harold Buchberg, Georgette Boden, Harry Blumenthal, Mirmira Bheemarao, Kirpal Balwani, Betty Aidala, Steven C. Gilbert, J. T. Kerr, Theodore Dinkins Sr, Yourlanges Bonano, Perry Kotzker, Cherre E. Ogden, M. A. Sullivan, P. G. Sladack, Layton Smith, L. Allen, Ella L. Logan, Robert P. McCarthy, Ronald Savitt, Margaret Quinn, James Carr, Mary Ann O'Gorman, K. I. Long, V. Labella, Carol Lenhard, Charles Degaetano, Elsie Colon, Kenneth Brown, Ron Cohen, B. Robotham, Howard Knobler, B. Wilson, W. Schubert, M. C. Cross, Linda Dianto, Dorothy Mcbean, A Mann, R. Regan, Shelia M. Porter, S. Pierre, Pierre, R. Charles, Valentine Koory, J. Giaimo, M Maikish, M. J. Mccann, Martha Dellacamera, Patrick J. Dimotta, Georgia Martinez, Lisa Toslopez, L. A. Riviezzo, Lou A. Riviezzo, Frederick J. Becker, O. Christian, Dominick Degaetano, J. H. Delventhal, D. Grey, W. M. Leask, Patricia Mcdonnell, D. J. Osso, D. R. Stanton, Brian Ward, Aida Pagan, Jean E. Smellie, Surenete Foster, Nancy Guzman, Nancy Brown, Lowell S. Goldberg, Annie Andrews, R. Barbera, I. Castro, Paul M. Maniscalco, N. Graham, P. Carrasquillo, William M. Day, James N. Basile, R. McCracken, Joel Friedman, Z. Goldfarb, Colden Grant, Walter M. Kowalczyk, John Lazzaro, J McNally, Gustave Pappas, Thomas M. Ryan, Mark E. Steffens, R. Cervo, M. Rice, Randall Hirth, Ulysses Grant and P. Hosey.

CITATIONS BELOW

The decision and order of the Court of Appeals is reported at 84 F3d 655 (2d Cir, 1996) (A 3-7).[1] The relevant opinion and order of the District Court is reported at 826 F Supp 736 (SDNY, 1993) (A 8-32). Another opinion and order of the District Court is reported at 865 F Supp 154 (SDNY, 1994) but it addresses no issues relevant to this petition.

JURISDICTION OF THIS COURT

The Court of Appeals' order was issued May 31, 1996 (A 3). There was no petition for rehearing. This Court has jurisdiction under 28 USC section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Tenth Amendment, United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fair Labor Standards Act

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix filed herewith; numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix filed in the Court of Appeals; numbers in parentheses preceded by the letters "SJA" refer to pages in the Supplemental Joint Appendix filed in the Court of Appeals.

is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USC §§ 206, 207] shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act ...) ....

Title 29, Code of Federal Regulations

§ 541.1 Executive.

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the

hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis ....

§ 541.2 Administrative.

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis ....

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because--

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

§ 541.118 Salary basis

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work-week in which he performs no work.

* * *

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability ....

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any

amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employees's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

STATEMENT OF THE CASE

Respondents are over 430 managers employed by petitioners the City of New York, the New York City Board of Education or the New York City Health and Hospitals Corporation ("petitioners"). Among the terms of respondents' contracts of employment is the requirement that they work as many hours each week as is necessary to discharge their responsibilities (JA 562, 596, 613). They are paid salaries and fringe benefits but no overtime. Almost all plaintiffs earn annual salaries of over $40,000; many earn annual salaries between $50,000 and $70,000; and some earn annual salaries over $70,000 (JA 521). They sued claiming that petitioners' policies on (a) partial-day absences, (b) court appearances, (c) temporary military leave and (d) disciplinary sanctions are not consistent with the salary basis test and therefore respondents are not exempt employees under the DOL regulations.

See 29 CFR section 541.118(a)(2)-(5) (supra pages 8-9). Respondents do not claim that their duties are not those of exempt employees. See 29 CFR sections 541.1(a)-(e), 541.2(a)-(d) (supra pages 5-7). Assuming that the complaint states a claim upon which relief may be granted, the District Court had jurisdiction under 28 USC section 1331 and 29 USC section 216(b).

Partial-Day Docking: After this Court held that the FLSA constitutionally could be applied to State and local governments, Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528 (1985), DOL received many inquiries from State and local governments about the salary basis test and particularly about the test's provision prohibiting deductions from salary for partial-day absences (as opposed to deductions for absences of a day or more, which are permissible under the salary basis test). 29 CFR section 541.118(a) (supra pages 8-9). These inquiries were caused by the fact that the partial-day docking prohibition was in direct conflict with the principle, applicable to virtually all, if not all, State and local governments, of public accountability, which means that public employees must account for all hours for which they are paid and that public employees must not be paid for time spent not working. See generally Service Employees International Union v. County of San Diego, 60 F3d 1346, 1352 & n.2 (9th Cir, 1995), cert. denied, ___ US ___, 116 S Ct 774 (1996) ("SEIU"); Mueller v. Reich, 54 F3d 438, 442 (7th Cir), cert. filed sub nom. Wisconsin v. Mueller, No. 95-586 (1995); Hilbert v. District of Columbia, 23 F3d 429, 435 (DC Cir, 1994) (Henderson, J, concurring in part and dissenting in part); 57 FR 37667. In New York, article VIII, section 1 of the constitution prohibits the gift of public funds and is understood to mean that public employees may not be paid for time not spent working. Boyd v. Collins, 11 NY2d 228, 234, 228 NYS2d 228 (1962); see Brooklyn Society for Prevention of Cruelty to Children, Inc. v. Blum, 56 NY2d 909, 912, 453 NYS2d 408 (1982); Mullane v. McKenzie, 269 NY 369, 377, 199 NE 624 (1936).

In fact, nothing in the record or respondents' papers herein, nor any judicial decision of which we are aware, names a single State or local government entity that does not operate under the public accountability principle.

DOL responded to the inquiries by letter rulings. A January 15, 1986 letter ruling states that if an employee is docked salary for a partial-day absence caused by illness, the employee would cease to be exempt because of the prohibition on partial-day docking but that the exemption would be lost only in the workweek in which the salary deduction were made, unless such deductions were "regular and recurring," in which case DOL would question whether the exemption should be lost in all workweeks (A 40). A January 9, 1987, letter ruling announced that DOL would follow a nonenforcement policy with respect to partial-day docking, although it noted that employees remained free to claim in lawsuits that their exempt status had been lost because of a salary deduction for part of a day (A 41-42). In that letter ruling DOL expressly recognized that deductions for partial-day absences, were required by the public accountability principle when leave balances had been exhausted and would cause the exemption to be lost because of the prohibition on partial-day docking (A 41). DOL stated that the nonenforcement policy would be followed while DOL gave consideration to proposed changes in the salary basis test (A 41).

In May of 1987, District Courts began issuing decisions in actions brought by State and local employees on the question of whether the exemption is lost where leave balances are used for partial-day absences and no actual salary deduction takes place (see A 30; 865 F Supp at 160 [District Court decision herein] and cases cited therein). Not until September 6, 1991, however, did DOL issue an interim final rule providing that docking for partial-day absences, when no accrued leave is available, will not cause an otherwise exempt employee to lose the exemption. 56 FR 45824 (later codified at 29 CFR section 541.5d) (supra pages 7-8). In issuing the interim final rule, DOL observed that, despite DOL's nonenforcement policy, diverging judicial interpretations of the salary basis test in lawsuits brought by employees had resulted in enormous exposure to public employers for back overtime wages to employees "some of whom would clearly be exempt if duties and amount of compensation alone were examined." 56 FR 45825. DOL recognized that the potential liability "could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the" FLSA. Id. After

discussing the public accountability principle, DOL stated that DOL recognized "that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems." Id.

DOL stated that it, id.:

> has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemptions for bona fide executive, administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

So grave did DOL find the situation facing state and local governments, however, that it issued its new rule as an interim final rule, to take effect immediately without waiting for the normal 30-day comment period and sought to make the new rule retroactive. 56 FR 45824, 45828-30.

On August 19, 1992, DOL issued a final rule revising section 541.5d in respects not relevant here; DOL had decided that its attempt to make its 1991 rulemaking retroactive was invalid. 57 FR 37666. In its accompanying comments, DOL again recognized that the combination of the public accountability principle and the salary basis test effectively prevented any public employee from falling within the managerial exemption (id. at 37667):

> Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt.

DOL stated that it first observed "this anomaly" after Garcia (id.). DOL also stated (id. at 37670):

> [I]t is clear to [DOL], after review of all of the comments [on its September 6, 1991 rule], that certain aspects of the "salary basis" test for distinguishing exempt from

> nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In [DOL's] view, these aspects are not valid indicators of the bona fides of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, [DOL] is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

DOL also stated that it is clear that (57 FR at 37672):

> Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because state and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

Disciplinary Sanctions: The concept underlying the public accountability principle is that public employers are answerable to the taxpayers for their use of public funds, including compensation paid to employees (57 FR 37667; see supra page 10). This principle certainly means that public employees are to properly do

their work and cannot do little work, improper work or engage in improper activities on the job. In other words, the ability of State and local governments to discipline their employees is as central to the public accountability prinicple as is their ability to insist that their employees be paid only for time spent working.

In the disciplinary area, this principle is joined by the principle of progressive discipline, which is that the punishment must not be disproportionate to the offense in light of the employee's disciplinary record. This principle is followed in New York. Pell v. Board of Education, 34 NY2d 222, 234-35, 356 NYS2d 833 (1974); McAvoy v. Ward, 145 AD2d 378, 381, 535 NYS2d 721, 723-24 (1st Dept, 1988), leave to appeal denied, 74 NY2d 606, 544 NYS2d 820 (1989); Hutchinson v. Lloyd, 216 AD2d 3, 627 NYS2d 46 (1st Dept), leave to appeal denied, 86 NY2d 710, 635 NYS2d 947 (1995).

Although in hindsight the conflict between the disciplinary component of the salary basis test, 29 CFR section 541.118(a)(5) (supra page 9), on the one hand, and the progressive discipline and public accountability principles, on the other, seems plain, the fact is that after Garcia everone focussed on the partial-day docking issue and largely overlooked the conflict as to the disciplinary component (see 865 F Supp at 159-60 [District Court opinion herein]). Plaintiffs sued on the partial-day docking component and the District Court rulings were on that issue. On March 29, 1991, DOL issued a letter ruling stating that because an employee need not be paid for any workweek in which the employee performs no work, 29 CFR section 541.118(a) (supra page 8), an otherwise exempt employee suspended without pay for one full week for disciplinary reasons will remain an exempt employee (A 48).

In its promulgation of 29 CFR section 541.5d in 1992, DOL addressed comments it had received about the disciplinary component of the salary basis test. 57 FR 37674. DOL began by noting that the disciplinary provisions were not strictly speaking open for comment during that rulemaking but promised to consider this subject again in proposed revisions to Part 541 "at a later date." Id. Among the comments received by DOL were that public employers have less freedom to terminate employees; that

public employers have virtually no other penalty options besides termination; that suspension for a full week is rarely imposed because of its severity; and that the failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees. Id.

DOL's response was that the comments have not provided a sufficient basis for distinguishing between the public and private sectors. Id. DOL stated, id.:

> Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

The limitations period in this lawsuit extends back to April 1, 1989. Petitioners' policies at issue in this case were as follows. Respondents were required to use leave balances, and if leave balances were exhausted, to lose salary, for partial-day absences (A 12); thus, the validity of the partial-day docking prohibition before the adoption of 29 CFR section 541.5d is an issue in this case. Respondents were required to use leave balances, and if leave balances were exhausted, to lost salary for court appearances as a witness when they or a relative had a personal interest in the proceeding (A 13). Pursuant to New York Military Law section 242[5], respondents received up to 30 calendar days, or 22 working days, of paid military leave per year and were not required to remit their military pay to petitioners (A 13; see JA 759-66). Cf. 29 CFR section 541.118(a)(4) (supra pages 8-9). Petitioners' disciplinary rules provided that respondents could be disciplined for a variety of infractions that are not violations of safety rules of major significance (JA 527-28). Possible penalties ranged from a reprimand to dismissal and included a fine or suspension (JA 528). There was no set penalty for any infraction (JA 527-28).

DECISIONS BELOW

The parties cross-moved for summary judgment in 1993. The District Court found that petitioners' policies concerning partial-day absences were in conflict with the salary basis test before the adoption of 29 CFR section 541.5d but decided that the Court need not address the significance of section 541.5d because other aspects of petitioners' policies allegedly mandated summary judgment for respondents (A 16-17 & n.8). The Court ruled that because respondents are subject to penalties for infractions of safety rules not of major significance, because they may have to take leave without pay for attending court proceedings in which they or someone related to them has a personal interest, and because petitioners' "limitation on paid military leave [to 30 days per year] presents the potential for employees on temporary military leave to take leave without pay," respondents do not fall within the managerial exemption because they do not meet the salary basis test (A 17-19). See 29 CFR section 541.118(a)(4) & (5) (supra pages 8-9).

The District Court then rejected petitioners' position that in order for the managerial exemption to be lost for a particular employee, an actual deduction from salary must occur. The Court held instead that the fact that a deduction from salary is theoretically possible under petitioners' pay system means that the salary basis test for exemption is not satisfied for every employee covered by that pay system (A 19-23). For brevity, we will refer herein to this as the "actual deduction" issue.

The Court of Appeals affirmed on the District Court's opinion (A 3-7). After noting the split in the federal Courts of Appeals on the actual deduction issue, and relating briefly the contentions of the parties and the rulings of the District Court, The Court of Appeals stated (A 6):

> Though the issues raised are important, no purpose would be served by adding further discussion to the dispute, already fully aired in the conflicting decisions cited above. We agree with the conclusions reached by [the District Court] in [its] comprehensive opinions, and

leave the ultimate resolution of the statutory dispute to the Supreme Court or the Congress.

REASONS TO GRANT WRIT

The issue of the application of the salary basis test to State and local government is one of extraordinary importance, for two reasons. The first is money. For example, the judgment in this case, with attorneys' fees and interest, is now over 14 million dollars (see A 32). But because there may be no class action under the FLSA, 29 USC section 216(a), the City of New York is a defendant in five other similar lawsuits with approximately 5,000 other plaintiffs. A very rough guess is that the City's exposure in those five other lawsuits may be as much as 20 to 25 million dollars.

And that is just one municipal corporation. We are aware of similar lawsuits within the State of New York against the State, the New York City Transit Authority and the Triborough Bridge and Tunnel Authority. For what it is worth, entering "29 CFR 541.118" or its equivalent into LEXIS yields 33 federal Court of Appeals cases and 111 District Court cases since 1985; not all of these are public sector cases but it appears that the overwhelming majority of them are. It would seem that every State or local government entity could be a defendant in such a case. And the financial burden may in fact be greatest on smaller entities, such as towns, villages, small cities and sparsely-populated counties, that do not have the financial reserves to respond in damages if virtually every employee previously thought exempt suddenly were entitled to years of back overtime.

Putting aside the question of back overtime, the salary basis test, as applied herein, leaves State and local governments between the Scylla and Charbdis of making virtually all of their previously-exempt employees hourly employees and of revising their policies to mirror the salary basis test. Making all of their managers hourly employees would be costly; the City of New York estimated, in this lawsuit, that if it were to make all of its managers hourly employees and if each manager were to work two hours of overtime each week, the annual cost to the City would be

60 million dollars. This is a lot of money, even to the Nation's largest city, and especially in these times of flat tax revenue and plummeting State and federal financial assistance, but once again the financial burden may well be greater on smaller governmental entities. This financial burden would be all the more unnecessary because it is undisputed that Congress intended that the managerial exemption be available to State and local governments (infra pages 19-20).

The alternative of revising policies to satisfy the salary basis test is no better. As set forth herein, the salary basis test is arbitrary and capricious and DOL has admitted it (supra pages 11-13; infra pages 28-32). Petitioners revised their policies after the District Court ruled on liability in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted (JA 1670-71, 1677; SJA 1832-39). This obviously creates the potential for abuse by unscrupulous employees and at least arguably causes petitioners to violate the public accountability principle.

The policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed (SJA 1832, 1834, 1837). Termination and demotion, the only remaining meaningful penalties, are very serious penalties and petitioners are loath to impose them unless they believe that the infraction is equally serious and the Courts will not overturn them under the progressive discipline principle. Because this leaves petitioners with no monetary penalties for less than very serious infractions, petitioners' ability to deter less than very serious infractions is greatly hampered. In addition, a failure by petitioners to take corrective action, such as imposing a disciplinary sanction on a wrongdoer, can be the basis for a lawsuit against petitioners under statutes such as Title VII of the Civil Rights Act of 1964. 42 USC section 2000e et seq. It is thus possible that a sanction too severe under the progressive discipline principle might be considered not sufficient as a corrective measure under Title VII.

The Salary Basis Test Must Be Struck Down

Arbitrary or capricious regulations violate the APA. 5 USC section 706(2)(A). Agency regulations "contrary to constitutional right" or "short of statutory right" also violate the APA. Id. section 706(2)(B) & (C). As a general matter, Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 US 29, 43 (1983):

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

To be arbitrary or capricious agency rules need not be irrational, as an Act of Congress must be in order to be struck down under the due process clause. Id. at 43 n.9.

Certainly, agency rules that are "manifestly contrary" to the relevant statute are to be struck down. E.g., United States v. Strong, 79 F3d 925, 928 (9th Cir, 1996); Brown v. Rock Creek Mining Co., 996 F2d 812, 816 (6th Cir, 1993). Rules must give effect to the unabmbiguously expressed intent of the statute. Northwest Motorcycle Association v. United States Department of Agriculture, 18 F3d 1468, 1471 (9th Cir, 1994). Reviewing Courts must be satisfied that an agency rule does not deviate from or ignore the ascertainable legislative intent. Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission, 734 F2d 1486, 1499 (DC Cir, 1984) (citation omitted).

The 1974 amendments to the FLSA, by which Congress extended the FLSA to all State and local governments, made no change in the managerial exemption. In addition, the Senate committee report refers to the 1974 amendments as extending the FLSA to "five million non-supervisory employees in the public sector," S Rep No 93-690 at 22 (JA 1810), and the House

committee report states that "virtually all non-supervisory employees" in the public sector will be covered, HR Rep No 93-313, reprinted in 1974 USCCAN (2d Sess) at 2837 (quoted at 57 FR 37667); see also 1974 USCCAN (2d Sess) at 2833, 2838. In short, there is no question that Congress intended that supervisors employed by State and local governments would come within the managerial exemption. DOL admits this. 57 FR 37672. Respondents do not dispute it. No Court has ever suggested otherwise.

The problem with the salary basis test, then, is that it was drafted decades ago when the FLSA applied only to the private sector and mostly to industrial positions. 57 FR 37672 n.11. Whatever its merit at that time, it is plain that the salary basis test is arbitrary and capricious and contrary to the intent of Congress now as applied to State and local government because to comply with it would require State and local governments to violate the public accountability and progressive discipline principles.

We do not address the jury duty component of the salary basis test because there is no question that petitioners' policies concerning jury duty always have been consistent with that component.

As to docking for partial-day absences, 29 CFR section 541.118(a)(2) (supra page 8), DOL effectively admitted that it should have permitted docking for partial-day absences the moment the FLSA became applicable to state and local governments (A 38-40, 43-46). 57 FR 37670. DOL's nonenforcement policy, announced in January of 1987, was intended to forestall loss of the managerial exemption on this basis but DOL failed to recognize, or recognized much too late, that the fact that its nonenforcement policy did not bar employee suits meant that the pervasive practice of docking for partial-day absences could lead to immense liability on the part of state and local governments. 56 FR 45824-25. So grave did DOL find the situation when it finally acted that it promulgated section 541.5d, which permits docking for partial-day absences in the public sector (supra pages 7-8), on an emergency basis as an interim final rule, reasoning that State and local governments needed relief so badly that they could not wait for

even a 30-day comment period. 56 FR 45825. DOL even attempted to make section 541.5d retroactive. 56 FR 45828-30.

The Ninth Circuit Court of Appeals found that the prohibition on partial-day docking, that existed before the effective date of section 541.5d, was contrary to Congress's intent and invalid. SEIU, supra, 60 F3d at 1352-53. In fact, the Court, having found that component of the salary basis test invalid, then declared the entire salary basis test invalid prior to the effective date of section 541.5d on the ground that for the Court not to do so would be for the Court to issue its own salary basis test and drafting such a test is for DOL, not the Courts. SEIU, supra, 60 F3d at 1353-54; accord, Balgowan v. State of New Jersey, 84 F3d 656, 660-61 (3d Cir), vacated, ___ F3d ___ (July 9, 1996).

Herein, the lower Courts, by failing to address this issue, effectively ruled that, contrary to SEIU, the partial-day prohibition was not infirm, and the salary basis test was valid, prior to the effective date of section 541.5d. This is a split in the federal Courts of Appeals that this Court must resolve. This issue affects every case where the limitations period began to run before the effective date of section 541.5d.

As to court appearances, the salary basis test requires that deductions may not be made for "attendance as a witness," although in a letter ruling DOL held that attendance not under legal compulsion could be considered an absence for personal reasons and therefore permissible under the salary basis test (A 52). 29 CFR section 541.118(a)(4) (supra pages 8-9). Thus a State or local government would be forced to pay an employee subpoenaed to testify for days even if the employee had a personal interest in the case but had been subpoenaed by any party, including a party with whom the employee was joined in interest. We fail to see how this indicates that the employee is employed in a "bona fide executive [or] administrative ... capacity." 29 USC section 213(a)(1) (supra page 5).

The salary basis test requires that deductions not be made for "temporary military leave," although DOL has held in a letter ruling that after an employee has used up all of the employees'

military leave, absences for military purposes could be considered permissible voluntary absences if the employee had not been ordered to duty (A 51-52). 29 CFR section 541.118(a)(4). The salary basis test's failure to define the word "temporary" renders this component hopelessly ambiguous and the lower Courts herein utterly failed to provide petitioners with any guidance on what "temporary" means.

Moreover, federal statutes require only 14 days of active duty training per year for reservists and 15 days of active duty training for members of the National Guard. 10 USC section 270; 32 USC section 502. As required by New York Military Law section 242[5], petitioners provide every employee with up to 30 calendar days, or 22 working days, of military leave each year but no more. Furthermore, 5 USC section 6323(a)(1) & (b) also limits paid military leave to 22 workdays per year. But herein the District Court, affirmed by the Court of Appeals, found that petitioners' policies on temporary military leave could result in a deduction impermissible under the salary basis test (A 18-19). Something is arbitrary and capricious here and deprives petitioners of the managerial exemption contrary to Congress's intent.

Perhaps most important, and clearly no less arbitrary and capricious, is the disciplinary component of the salary basis test. 29 CFR section 541.118(a)(5) (supra page 9). In terms of making petitioners' argument that this component was drafted with private-sector factories in mind and is outdated and plainly inappropriate to the public sector today, the regulation speaks for itself, addressing as it does rules designed to prevent explosions on the premises. The language of this component clearly implies that deductions in salary as a penalty for an infraction of anything other than a "safety rule of major significance" are not permissible under the salary basis test. It seems to us a dubious proposition that Congress intended employees to be exempt only if their employers refused to impose monetary penalties on them for violations of rules other than safety rules of major significance.

In addition, however, section 541.118(a) provides that "an employee need not be paid for any work-week in which [the employee] performs no work" (supra page 8) and DOL has

interpreted this provision as qualifying the disciplinary component, i.e., an employee may be suspended for an entire work-week, and not paid for that week, without violating the disciplinary component (A 48, 50-51). Thus, according to the disciplinary component, Congress intended that employees could be exempt only if, regardless of the infraction, their employers limited the types of penalties involving loss of salary to termination or suspensions without pay of some whole number of work-weeks. According to DOL, the exemption would not be lost if an employee is suspended for five weeks for stealing a pencil, but would be lost if an employee is suspended for one day, or is suspended for five days but those five days fall in two different work-weeks, for punching his or her supervisor. Congress could not have intended this. It is irrational.

The irrationality of the disciplinary component is made even more clear by considering the disciplinary component together with the other provisions of the salary basis test. It is permissible to deduct half a day's salary if an employee goes to the dentist or a baseball game. However, if an employee is out for half of a day to go to a baseball game but charges the time to sick leave, and is caught, the least serious penalty that the employer may impose that involves money is a suspension of a work-week.

Thus, the irrationality of the disciplinary component seems to us plain in both the private and public sectors, although petitioners are public sector employers and thus are not concerned here with the application of the salary basis test to the private sector. But the irrationality of the disciplinary component is even greater, if that is possible, as applied to the public sector, where because of the public accountability principle supervisors cannot look the other way when employees go to baseball games but charge the time to sick leave and where the progressive discipline principle may well prohibit a one-week suspension for charging four hours to sick leave rather than vacation time.

It is true that DOL considered and rejected changing the disciplinary component, but as DOL explicitly noted, the disciplinary component was not open for comment at the time (supra page 14). In any event, DOL's failure to abolish the

disciplinary component was arbitrary and capricious and contrary to Congress's intent because the disciplinary component, like the rule against docking for partial-day absences, effectively deprives state and local governments of the managerial exemption. When DOL promulgated the final rule in 1992 permitting docking for partial day absences, the statements it made about the salary basis test and the public accountability principle would be equally valid if made about the disciplinary component of the salary basis test and the progressive discipline principle (supra pages 12-13). Furthermore, DOL's comments in declining to abolish or amend the disciplinary component demonstrate that DOL did not know what it was talking about (supra pages 14-15). DOL viewed the problem with terminations to be procedural only but the fact is that the law places substantive limits on the ability of public employers to terminate employees for infractions. For example, in Hutchinson v. Lloyd, supra, 216 AD2d 3, 627 NYS2d 46, the termination of a sanitation worker for an altercation with a civilian was vacated as too harsh.

DOL also observed that other sanctions, such as reprimands, demotions and reassignment or restriction of duties are available (supra page 15). However, demotions and reassignment may well result in loss of salary. More importantly, DOL just missed the point: termination, demotion and even suspension without pay for a week, are severe penalties and "reprimands" and "restriction of duties" are minor penalties, leaving public employers with no options in between.

Most importantly, DOL believed that the question was whether there was a sufficient basis for distinguishing between the public and private sectors (supra page 15). That was not the question. The relevant questions, in light of the public accountability and progressive discipline principles, were: (a) how, indeed whether, the disciplinary component as applied to the public sector helps determine whether an employee is "employed in a bona fide executive [or] administrative capacity" and (b) whether the disciplinary component effectively denies the managerial exemption to state and local governments. The answers are: (a) it does not and (b) it does.

We respectfully submit that the foregoing demonstrates that this Court should grant the petition in order to determine whether the salary basis test should be struck down as arbitrary and capricious and contrary to Congress's intent. But even if this Court determines that that question is not worthy of review, there remains an important question about interpretation of the salary basis test that this Court should address in order to provide important guidance to the lower Courts. That question is whether the salary basis test, strictly speaking, is a "regulation" entitled to substantial deference or an "interpretation" entitled to deference only to the extent that it is "persuasive."

In Skidmore v. Swift & Co., 323 US 134, 140 (1944), this Court held that DOL's "interpretations" of the FLSA assist in discovering Congressional intent only if they evidence thorough consideration and valid reasoning, are consistent with other agency pronouncements and present "all those factors which give it power to persuade." This holding was not overruled by Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 US 837 (1984), which held that legislative-type "regulations" of federal agencies are entitled to deference. Chevron recognized that the judiciary must reject administrative constructions that are contrary to clear congressional intent and that even legislative regulations should not be upheld if they are manifestly contrary to the statute. Id. at 843 n.9, 844.

Indeed, only eight weeks before issuing its decision herein, the Court of Appeals, in a case involving a claim by private-sector exempt employees that they in fact did not satisfy the salary basis test, recognized that DOL's "interpretations" in 29 CFR section 541.302 were "interpretations" and not "regulations" and were entitled to deference only if they were persuasive. Freeman v. National Broadcasting Company, Inc., 80 F3d 78, 83-84 (2d Cir, 1996).

Here, the salary basis test of 29 CFR section 541.118(a), as is 29 CFR section 541.302, which was applied in Freeman, is found within Subpart B of 29 CFR Part 541, which is entitled "Interpretations." (Sections 541.1, 541.2 and 541.5d of 29 CFR are found in Subpart A of 29 CFR Part 541, which is entitled

"General Regulations.") See 29 CFR Sections 500 through 899, revised as of July 1, 1995, at pages 356-57. The District Court herein made no inquiry into the persuasiveness of the salary basis test, citing neither Chevron nor Skidmore, and petitioners argued to the Court of Appeals (as they had to the District Court) that Skidmore and not Chevron applied to the salary basis test but the Court of Appeals affirmed on the District Court's opinion.

Thus, the Court of Appeals's decision herein is in conflict with Skidmore and Freeman. Therefore, even if this Court is not persuaded to grant the petition for the reasons stated above, this Court should grant the petition in order to make clear that Skidmore and not Chevron controls analysis of the salary basis test.

The Tenth Amendment

In National League of Cities v. Usery, 428 US 833 (1976), this Court held that the tenth amendment prohibited application of the FLSA to State and local government employees engaged in traditional governmental functions. In Garcia v. San Antonio Metropolitan Transit Authority, supra, 469 US 528, this Court found the "traditional governmental function" test unworkable, overruled National League of Cities and held that the commerce clause provided sufficient authority for the application of the FLSA to all State and local government employees. In Garcia this Court observed that the States would have to rely on the national political process and their representation in Congress to protect their interests. 469 US at 552-54, 556-57. The dissent in Garcia observed, among other things, that federal administrative agencies cannot be expected to be as knowledgeable about or responsive to State interests as Congress. 469 US at 576-77 & n.18 (Powell, J, dissenting). The majority in Garcia did not address the question of the responsiveness of federal agencies to State concerns.

In South Carolina v. Baker, 485 US 505, 512 (1988), this Court stated:

> Garcia left open the possibility that some extraordinary defects in the national political process might render

congressional regulation of state activities invalid under the Tenth Amendment.

This Court should grant the petition here in order to determine whether DOL's grossly inadequate and snail-like response to the clash, that arose after Garcia effectively applied the FLSA to the States, between the salary basis test and the public accountability and progressive discipline principles, or Congress's failure to do anything about DOL's lethargy, constitutes just such an extraordinary defect in the national political process.

Before reviewing DOL's indefensible response, we note three very significant items. First, it is undisputed that Congress intended that the managerial exemption be available to State and local governments (supra pages 19-20). It is the bureaucracy at DOL that has failed, with one exception, to revise the salary basis test to take account of the public accountability and progressive discipline principles and thus effectively deprived State and local governments of the managerial exemption contrary to Congress's intent and for no rational reason. The action, or rather inaction, of a federal agency is certainly entitled to less weight as an indication of Congressional intent under the commerce clause than an Act of Congress itself. Cf. Seminole Tribe of Florida v. Florida, ___ US ___, ___, 116 S Ct 1114, 1123 (1996) (Congressional intent to subject States to suit in federal Court must be unequivocally expressed).

Second, DOL's denial to the States of the managerial exemption, clearly intrudes on rights of the States protected by the tenth amendment. At the time of the adoption of the constitution and bill of rights the authority of the States to discipline their high-level employees by withholding or reducing their salaries was well-established. See Petition for Writ of Certiorari in Wisconsin v. Mueller, No. 95-586, at pages 20-23.

And third, the City of Baltimore is a defendant in a similar suit, Fraternal Order of Police v. Baltimore City Police Department, No. B-92-1066 (D Md), in which that City submitted expert affidavits that, we respectfully submit, undermine Garcia's idea that the States' representation in Congress will be sufficient to

protect their rights under the tenth amendment. Both experts testified that there has been a dramatic decline in the power of State and local governments in Congress because of the decline in the power of State and local political party organizations at the national level, rule changes, the increased cost of Congressional election campaigns and the rise of national lobbying organizations, which of course contribute to election campaigns while State and local governments do not. One of those experts testified that much real power in decisionmaking has been shifted away from Congress by the expansive delegation of authority to regulatory agencies because these agencies are responsive to their leadership, individual members of Congress (such as the relevant subcommittee chairpersons), organized interest groups and others not directly accountable to the electorate.

The point is that the national political process has failed here primarily because, as the dissent in Garcia feared, Congress's delegation of authority to DOL has resulted in a regulation that even its author DOL admits intrudes on a principle fundamental to State governments.

We now demonstrate that DOL's response to the clash between the salary basis test and the public accountability and progressive discipline principles is an "extraordinary defect in the national political process." This clash was called to DOL's attention immediately after Garcia. In a January 15, 1986 letter ruling DOL stated that an occasional impermissible deduction for a partial-day absence would result in the loss of the managerial exemption only for that employee and only for that work-week (A 40; see also A 45-46). One year later, in a letter ruling dated January 9, 1987, DOL announced a nonsensical nonenforcement policy (A 41-42). DOL stated that while it was considering changes in section 541.118, it would not enforce the prohibition on partial-day docking. This policy was sensible to the extent that, as DOL explicitly recognized in announcing it, deductions for partial-day absences would be required by the public accountability principle but would cause the exemption to be lost (A 41). But it was nonsensical because DOL did not issue a regulation prohibiting suits by employees; not surprisingly, employees brought suits and the District Courts began issuing decisions containing various

rulings on the salary basis test as applied to State and local governments (see A 30; 865 F Supp at 160 [District Court opinion herein]). The Ninth Circuit Court of Appeals described DOL's nonenforcement policy as DOL "punting" to the Courts. SEIU, supra, 60 F3d at 1357.

On January 16, 1987, DOL stated in the Federal Register that it expected to publish a notice of proposed rulemaking concerning 29 CFR Part 541 in 1987. 52 FR 2019. It was not until September 6, 1991, however, that DOL issued an interim final rule and that rule, eventually codified at 29 CFR section 541.5d (supra pages 7-8), addressed only the partial-day docking issue. 56 FR 45824. In issuing the interim final rule, DOL observed that diverging judicial interpretations of the salary basis test in lawsuits brought by employees had resulted in enormous exposure to public employers for back overtime wages to employees "some of whom would clearly be exempt if duties and amount of compensation alone were examined" **(1561)**. 56 FR 45824. In other words, DOL, having punted to the Courts, blamed them for the problems caused by DOL's inaction.

So grave did DOL find the situation facing state and local governments in 1991 that it issued its new rule as an interim final rule, believing that State and local governments should not be forced to wait for the normal 30-day comment period, and sought to make the new rule retroactive. 56 FR 45824, 45828-30. DOL also stated that it, 52 FR 45825:

> has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemptions for bona fide executive, administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

However, to this day DOL has not issued any proposed changes to the salary basis test. In response to an order from this Court in Auer, however, seeking the Solicitor General's views, DOL announced that it henceforth would apply the "actual deduction" interpretation of the salary basis test (infra page 36). It is

unconscionable for DOL to have waited to make this announcement until after four of the federal Courts of Appeals had adopted the "theoretical possibility" interpretation (infra page 34).

What DOL has done instead is issue (a) mind-boggling admissions that the salary basis test is arbitrary and capricious and contrary to Congress's intent as applied to State and local governments and (b) promises to revise the regulations, promises it has not kept. In reissuing the interim final rule as a final rule in August of 1992, DOL stated, among other things, 57 FR 37672:

> In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because state and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

On November 14, 1994 DOL published its "1994 Regulatory Plan" in the Federal Register. DOL stated of its adoption of 29 CFR section 541.5d in 1991, "These revisions were limited in nature and the regulations are still in need of updating and clarification.... [DOL has] conclude[d] that a comprehensive review of these regulations is both necessary and appropriate. The Department intends to solicit input through a public hearing process to identify issues and to develop regulatory proposals." 59 FR 57130. DOL stated further, 59 FR at 57130:

> Because of the limited nature of these revisions, the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment....

* * *

Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. The Department intends to reopen the comment period of the November 1985 advance notice of proposed rulemaking and to obtain additional information pertaining to matters that have arisen subsequently through a hearing process.

Some 23 million employees are within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and will eliminate this apprehension.

In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s and that they do not readily adapt to contemporary government functions. The Federal Government also has concerns regarding the manner in which the courts and arbitration decisions are applying the exemption to the Federal work force. Resolution of these conflicts over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable.

For "date" of "ANPRM Second - Hearing Notice," DOL gave, on November 14, 1994, "11/00/94"; for "date" of "NPRM," DOL gave "4/00/95." 59 FR at 57130.

In fact, no advance notice of proposed rulemaking was issued. Rather, in its May 8, 1995 Semiannual Agenda of Regulations, DOL published virtually verbatim what it had published on November 14, 1994. 60 FR 23544-45. However,

DOL dropped, sub silentio, its intention to hold hearings and to issue a second advance notice of proposed rulemaking: in its May 8, 1995 agenda, DOL did not mention dates for hearings or an advance notice of proposed rulemaking. Instead, for "date" of "NPRM" DOL gave "10/00/95." 60 FR 23545.

In fact, no notice of proposed rulemaking was issued. In what plainly will be a semiannual ritual, on November 28, 1995 DOL published its next Statement of Regulatory Priorities. 60 FR 59608. The language concerning the managerial exemption is essentially the same, although it was edited to make it somewhat shorter and DOL tactfully removed the statement that its regulations are "sorely out-of-date." DOL did report, however, "The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed." 60 FR 59613. For "date" of "NPRM" DOL gave "06/00/96."

In keeping with the semi-annual ritual of inactivity, on May 13, 1996 DOL reiterated its usual reiterations about 29 CFR Part 541. 61 FR 23239. For "NPRM" it gave the date of "01/00/97" and for "NPRM Comment Period End," "03/00/97." 61 FR 23240.

It is difficult to imagine a more plain admission by an agency that its regulations are contrary to the statute they are supposed to be interpreting. Furthermore, it is now almost ten years since DOL first explicitly recognized the problem by adopting its nonenforcement policy. Accordingly, this Court should grant the petition to determine whether DOL's inaction violates the tenth amendment.

In the alternative, if this Court does not grant the petition for that reason, this Court should grant the petition to determine whether the tenth amendment requires that the salary basis test be declared contrary to the FLSA and therefore invalid or in the alternative interpreted so as to avoid or minimize its conflict with the public accountability and progressive discipline principles (see infra pages 33-37). In Gregory v. Ashcroft, 501 US 452

(1991), there arguably was a conflict between the federal Age Discrimination in Employment Act ("ADEA") and a State constitutional provision requiring that judges retire at age 70. This Court stated, id. at 461 (quotation marks omitted):

> If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.

This Court therefore looked in the ADEA's provision setting forth who is covered by the Act for a plain statement that judges are covered. Finding none, this Court found no conflict between the ADEA and the State constitutional provision. And in New York v. United States, ___ US ___, ___, 112 S Ct 2408, 2425 (1992) (quotation marks omitted) (citation omitted), this Court stated:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Here, as DOL itself has recognized, because State and local governments operate under the public accountability and progressive discipline principles, the salary basis test effectively deprives State and local governments of the managerial exemption, which Congress plainly intended be available to those governments. Thus, this Court should grant the petition in order to determine whether the salary basis test, as an interpretation of an Act of Congress, should be: (a) struck down because it upsets the usual balance of power between the State and federal governments in purported reliance on a statute that plainly did not intend to do so or (b) interpreted so as to minimize the conflict between the salary basis test and the right of the States to discipline their high-level employees.

This Court Must Address The "Actual Deduction" Issue

The actual deduction issue (see supra page 16) is raised by the petition in Auer v. Robbins, which was granted (supra page i). Thus, even if this Court does not believe that the petition herein should be granted for the foregoing reasons, this Court should at least hold this petition for summary disposition and remand of the case after this Court rules in Auer.

Although the facts of every case are unique, the actual deduction issue has been addressed by nine Courts of Appeals; five have ruled that an actual deduction is required before a violation of the salary basis test is shown and four have ruled that the mere theoretical possibility of a deduction impermissible under the salary basis test is sufficient to violate the test and render non-exempt every employee subject to that theoretical possibility. Requiring an actual deduction are the Fifth, Sixth, Eighth, Ninth and Eleventh Circuit Courts of Appeals. E.g., York v. City of Wichita Falls, 944 F2d 236, 242 (5th Cir, 1991); Michigan Association of Government Employees v. Michigan Department of Corrections, 992 F2d 82, 86 (6th Cir, 1993); Auer v. Robbins, 65 F3d 702, 710 (8th Cir, 1995), petition for cert. granted, No. 95-897 (1996); Barner v. City of Novato, 17 F3d 1256, 1262 (9th Cir, 1994); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F2d 800, 805 (11th Cir, 1991). Finding a theoretical possibility sufficient are the District of Columbia, Second, Seventh and Tenth Circuit Courts of Appeals. E.g., Kinney v. District of Columbia, 994 F2d 6, 11 (DC Cir, 1993); Yourman v. Dinkins, 84 F3d 655 (2d Cir), petition for cert. filed, ___ USLW ___ (1996); Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F2d 279, 286 (7th Cir, 1993); Carpenter v. City and County of Denver, 82 F3d 353, 359 (10th Cir, 1996). The Third Circuit Court of Appeals adopted the theoretical possibility view in Balgowan v. State of New Jersey, 84 F2d 656, 661-63 (3d Cir, 1996), but that decision was vacated on reargument by order dated July 9, 1996 and no new decision has been issued.

We respectfully submit that a more "cert-worthy" split in the Circuits is difficult to imagine. Moreover, we respectfully submit that the view that actual deductions are required plainly is

the far superior view. As to impermissible deductions for Court appearances and temporary military leave, it seems to us nonsensical for the law to be that virtually all City managers must be considered hourly workers when only a tiny fraction of them ever will testify in Court and only a tiny fraction of them are members of the National Guard or Reserves.

However, we submit that the failure of the "theoretical possibility" view, adopted by the District Court and Court of Appeals herein, to render the regulations rational is made even more apparent by the disciplinary component. In this case the only respondent who suffered a salary reduction that was not reimbursed or the result of the settlement of disciplinary charges was an employee who was demoted for two weeks, thus losing $258 in salary, for typing an obscene message, apparently about a female co-worker, on the Emergency Medical Services computer system. Under the view of the lower Courts herein, because of this petitioners must pay over 13 million dollars in back overtime to over 430 employees who apparently never received a disciplinary penalty involving salary and always knew that they were expected to work as many hours as necessary to discharge their responsibilities and whose salaries, in many instances high salaries, were set with the understanding that they would work as many hours as necessary to discharge their responsibilities and would not be paid overtime.

Two other reported decisions also demonstrate the failure of the "theoretical possibility" view as to the disciplinary component. In Avery v. City of Talladega, 24 F3d 1337, 1342 (11th Cir, 1994), a police lieutenant was disciplined for leaving the scene of an apparent suicide. The Court of Appeals held that the managerial exemption thus was lost as to all lieutenants. The Court held that it would be irrational for the exemption to be lost only for the lieutenant in question because that would reward the employee who committed the infraction. Instead, the Court rewarded the employee who committed the infraction and all his fellow lieutenants for the entire limitations period. And in Pautlitz v. City of Naperville, 781 F Supp 1368, 1369, 1372 (ND Ill, 1992), three police sergeants were disciplined for eating sausage sandwiches given to them at no charge at the Naperville Fair. Not

only did they get to keep the sandwiches, but also they and all their fellow sergeants got overtime for the entire limitations period. It is unfortunate for the Naperville lieutenants that no lieutenant was given a sausage sandwich, because in that event all the lieutenants would have received back overtime as well.

We must note that in response to this Court's invitation to the Solicitor General, while the petition for a writ of certiorari was pending, to submit his views on the Auer case, the Solicitor General submitted a brief, on behalf of DOL, in which DOL announced that it adopted the "actual deduction" view and not the "theoretical possibility" view of the salary basis test. In that brief, as it appears on LEXIS, the Solicitor General stated:

> An employee who is otherwise paid on a salaried basis does not lose that status simply because he is theoretically "subject to" an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. Rather, salaried status is lost under the regulations only when employees are "subject to" such a disciplinary suspension as a practical matter. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, e.g. [sic] whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week.

The Solicitor General then noted that in Auer there was evidence of only one impermissible deduction since 1978 and stated, "In those circumstances, it would ignore the realities of [the

employer's] compensation scheme to characterize [the employees] as hourly-paid, rather than salaried, employees."

If this Court agrees with petitioners that the "actual deduction" view should prevail, the question would arise of what the remedy should be for an otherwise-exempt employee who suffers an impermissible deduction. The answer is that the employer should be permitted to use what has been termed the "window of correction" in 29 CFR 541.118(a)(6). The question of use of the window of correction is presented in Auer v. Robbins and we respectfully refer the Court to the petition and brief in opposition to the petition in that case. Thus, the question of the use of the window of correction is another reason why the petition should be granted in this case.

In addition, DOL letter rulings state that in the case of infrequent impermissible deductions the managerial exemption would be lost only for the employee in question and only in the work-week in which the impermissible deduction occurred (A 40, 45-46). See also 57 FR 37669 (quoting unpublished January 17, 1986 letter ruling). This Court should grant the petition herein in order to determine whether this should be the result if this Court determines that the "window of correction" is not available in Auer or the present case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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LEONARD J. KOERNER,*
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July 24, 1996

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OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1537, 1772 -- August Term 1995

Argued: May 1, 1996 Decided: May 31, 1996

Docket Nos. 95-7561, -7610XAP

HAROLD YOURMAN, RALPH BISHOP, WILLIAM H. DWORKIN, FREDERICK EWALD, JOHN L. HENDERICKSON, RICHARD KREPELA, ROBERT P. McCARTHY, FRANK MEYER, ANTHONY PUNZI, and RONALD L. SAVITT, on behalf of themselves and all other employees similarly situated,

Plaintiffs-Appellees-
Cross-Appellants,

v.

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants-Appellants-
Cross-Appellees.

Before: NEWMAN, Chief Judge, FEINBERG and OAKES, Circuit Judges.

Appeal and cross-appeal from the May 12, 1995, judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, Judge) determining that municipal employees are entitled to overtime pay.

Affirmed on the opinions of the District Court, Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993); Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Timothy J. O'Shaughnessy, Office of the Corporation Counsel, New York, N.Y., (Paul A. Crotty, Corporation Counsel, Kristin M. Helmers, Office of the Corporation Counsel, New York, N.Y.; on the brief), for defendants-appellants-cross-appellees.

Edward M. Scher, Asst. Atty. Gen., Albany, N.Y. (Dennis C. Vacco, N.Y. State Atty. Gen., Victoria A. Graffeo, Peter H. Schiff, Office of the N.Y. State Atty. Gen., Albany, N.Y., on the brief), for amici curiae State of New York.

Joan Stern Kiok, New York, N.Y. (Robert N. Felix, New York, N.Y., on the brief), for plaintiffs-appellees-cross-appellants.

(James E. Doyle, Atty. Gen., Richard Briles Moriarty, Asst. Atty. Gen., Wisconsin Dept. of Justice, Madison, WI, submitted a brief for amicus curiae State of Wisconsin).

(Arthur A. Hartinger, Liebert, Cassidy & Frierson, San Francisco, Cal., Louise H. Renne, Jonathan V. Holtzman, Darren W. Lee, City Atty's. Office, San Francisco, Cal., submitted a brief for amici curiae National League of Cities, et al.).

(Richard Schoolman, Brooklyn, N.Y., submitted a brief for amicus curiae New York City Transit Authority).

(Richard E. Casagrande, Lisa M. King, Albany, N.Y., submitted a brief for amicus curiae New York State Public Employees Federation, AFL-CIO).

PER CURIAM:

This appeal presents an issue that continues to divide the federal courts: how to apply in the public sector the Department of Labor's "salary basis" test, which is used to determine whether employees are managers and consequently not covered by the wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1994). Some courts have ruled that the "salary basis" test is not met and employees are therefore protected by FLSA requirements where their pay is subject to reduction, even if no reduction has occurred. See Carpenter v. City & County of Denver, [82 F.3d 353] (10th Cir. 1996); Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995); Barner v. City of Novato, 17 F.3d 1256, 1262 (9th Cir. 1994); Kinney v. District of Columbia, 301 U.S. App. D.C. 279, 994 F.2d 6, 11 (D.C. Cir. 1993); Michigan Association of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 86 (6th Cir. 1993). Other courts have ruled that the "salary basis" test is met and employees are therefore exempt from FLSA protections as long as no deductions from compensation have been made. See Auer v. Robbins, 65 F.3d 702, 711 (8th Cir.), petition for cert. filed, 64 U.S.L.W. 3428 (Dec. 7, 1995); McDonnell v. City of Omaha, 999 F.2d 293, 297 (8th Cir. 1993), cert. denied, 127 L. Ed. 2d 538, 114 S. Ct. 1188 (1994); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

Appellants, the Mayor of New York City, the City's Board of Education, and its Health and Hospital Corp. (collectively, "the City"), appeal from the May 12, 1995, judgment of the District Court for the Southern District of New York (Loretta A. Preska, Judge), granting relief in the form of overtime pay under the

FLSA to appellees, 435 of the City's supervisory employees ("the employees"). The City contends that the "salary basis" test, as applied to public employers, is irrational and violates the Administrative Procedure Act, 5 U.S.C. §§ 551-596 (1994), and also violates the Tenth Amendment. Alternatively, the City claims that its employees are not "subject to" reduction in pay, a criterion of the "salary basis" test, because (with one small exception), no reductions in pay have actually occurred. The City also claims a defense of good faith under the Portal-to-Portal Act, 29 U.S.C. § 259 (1994). The employees cross-appeal from that portion of the judgment that denied them straight time pay for hours worked between 35 and 40 hours per week.

In a thorough and thoughtful opinion, the District Court ruled that the City's express policies concerning deductions for discipline, court attendance, and temporary military leave placed the employees outside the managerial exemption. The District Court also reasoned that the employees were "subject to" pay reductions based on the express policies, and therefore that the City was liable to all employees in that classification, whether or not the policies had actually been applied. Finally, the District Court rejected the City's contention that the "salary basis" test, as applied, violates the Tenth Amendment and the Administrative Procedure Act, and also rejected the defense of good faith. Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993).

On the employees' cross-appeal, the District Court found in a separate opinion that the employees were not entitled to "gap time" pay because the parties' employment agreement contemplated that the employees' salary would compensate for all hours worked up to the overtime threshold, with a minimum of 35 hours per week. Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Though the issues raised are important, no purpose would be served by adding further discussion to the dispute, already fully aired in the conflicting decisions cited above. We agree with the conclusions reached by Judge Preska in her comprehensive opinions, and leave the ultimate resolution of the statutory dispute to the Supreme Court or the Congress.

As to both the City's appeal and the employees' cross-appeal, we affirm on the opinions of the District Court.

OPINION AND ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

YOURMAN, et al.,

Plaintiffs,

- against -

DINKINS, et al.,

Defendants.

----------x

OPINION and ORDER

91 Civ. 2197 (LAP)

APPEARANCES:

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Loretta A. Preska, U.S.D.J.

Plaintiffs are employees of the City of New York (the "City"), the New York City Health and Hospitals Corporation (the "HHC"), and the Board of Education of the City School District of the City of New York (the "BOE") who have been designated as "managerial" employees by their respective employers. They bring this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1988), seeking unpaid overtime compensation at time and one-half their regular rate of pay for all hours worked in excess of forty hours each week. See 29 U.S.C. § 216(b).[1]

Additionally, plaintiffs whose regular work week is thirty-five hours seek overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code of the City of New York § 12-108.[2]

Before the Court are the parties' cross-motions for summary judgment. The Court finds, as each of the parties maintains, that no genuine issue as to any material fact concerning liability exists; the Court's task is therefore to apply the law to the facts before it. See Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992). As to the FLSA claim, the Court finds that plaintiffs are not exempt from the overtime compensation provisions of FLSA and therefore grants plaintiffs' motion and denies defendants' motion as to FLSA liability. As to the state claim, the Court finds that plaintiffs do not meet the requirements of § 12-108 and therefore grants defendants' motion and denies plaintiffs' motion as to that claim. Only the issue of damages under FLSA remains to be settled in this action.

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[1] Plaintiffs also seek liquidated damages and reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216(b) and declaratory relief pursuant to 28 U.S.C. §§ 2201-02.

[2] The Court has subject matter jurisdiction over this state claim pursuant to 28 U.S.C. § 1367.

I. Defendants' Time and Leave Regulations

Central to this action are the written time and leave regulations applicable to plaintiffs issued by the City ("City Regs."), the HHC ("HHC Regs."), and the BOE ("BOE Regs."). These regulations specify a minimum work week of thirty-five hours, and the City and the BOE regulations expressly require employees to work any additional hours and days necessary to carry out their responsibilities. City Regs. § 3.0; HHC Regs. § 1.0(B)(1); BOE Regs. § 4(a).[3] The regulations do, however, provide some flexibility for employees to vary, with supervisor approval, the hours worked on a given day in order to compensate for unusually long hours worked in a certain period, two weeks for the City and the BOE and one week for the HHC. City Regs. § 3.0; HHC Regs. § 1.0(C)-(D); BOE Regs. § 4(b).

Pursuant to the regulations, employees must maintain time records reflecting their hours worked. City Regs. § 11.1; HHC Regs. § 1.0(A); BOE Regs. § 5; see Defs.' Resp. to Pltfs.' First Reg. for Admis. of Facts ("Defs.' Admis.") No. 10. The impetus for the institution of this action is plaintiffs' failure to receive any credit for time worked beyond the regular work week. See City Regs. § 6.0; BOE Regs. § 10(a).

As will be made clear below, critical to the determination of whether plaintiffs should receive overtime compensation under FLSA is an analysis of the circumstances under which deductions may be made by defendants from plaintiffs' compensation. Leave allowances provided by defendants to plaintiffs are important in this regard.

Plaintiffs accrue between twenty and twenty-seven days of paid annual leave allowance each year which can be used for

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[3] Plaintiffs in uniformed service, e.g., Administrative Fire Marshals and General Superintendents (Sanitation), work forty-hour weeks but are otherwise governed by the same regulations in all respects material to this action. None of the plaintiffs in uniformed service work in the New York City Police Department or in the New York City Correction Department, and the Court makes no findings in regard to employees of those departments in uniformed service.

vacation, personal business, or religious holiday leave. City Regs. § 4; HHC Regs. § 2.1; BOE Regs. § 8. Plaintiffs also accrue twelve days of paid sick leave allowance each year. City Regs. § 5; HHC Regs. § 2.2; BOE Regs. § 9. Use of annual leave allowance and sick leave allowance requires the approval of a supervisor and is measured by the hour for the City and the BOE and by the half-hour for the HHC. City Regs. §§ 4.4, 5.3; HHC Regs. §§ 1.0(B)(3), 2.1(E), 2.2(C); BOE Regs. §§ 8, 9.[4]

Various scenarios exist under the regulations in which defendants may make deductions from plaintiffs' compensation. Employees are most clearly susceptible to pay deductions in instances where they have been absent from work yet have exhausted their leave allowances or have not received approval for use of leave allowances.[5] Additionally, defendants provide for a lump sum payment of unused accrued leave upon separation from employment. City Regs. § 7; HHC Regs. § 8.0; BOE Regs. § 14. Charges made against a leave allowance during employment may then be construed as deductions in pay to the extent any lump sum payment might be reduced accordingly.[6] Furthermore, a deduction

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[4] Additionally, supervisors have discretion to authorize limited use of a leave allowance before it is earned. City Regs. §§ 4.5, 5.4; HHC Regs. §§ 2.1(E), 2.2(C)(3); BOE Regs. §§ 8(f), 9(f). Under certain circumstances, supervisors also have the discretion to grant paid leave to employees who are absent due to personal illness and have exhausted their leave allowances. City Regs. § 5.5; HHC Regs. § 2.2(C)(4); BOE Regs. § 9(g).

[5] "[A] managerial employee could incur a deduction from pay for an absence of less than one work day, but only if the managerial employee has exhausted his or her leave balances. In addition, even if the managerial employee's leave balances are exhausted, the employee could avoid a pay reduction because the employing agency may advance the employee leave time to be earned in the future or may offset longer hours worked on other days during the same pay period." Defs.' Admis. No. 2; see id. No. 7 (similar); see also id. No. 3 (similar for deductions from leave allowance).

[6] While this argument equating charges against a leave allowance with deductions in pay is informative, the Court does not rely upon it to decide the instant motions. Cf. Abshire v. County of Kern, 908 F.2d 483, 487 n.3 (9th Cir. 1990) (declining to address whether employees subject to deductions would be salaried if the deductions were only from leave time and not base pay), cert.

in compensation may occur in connection with the calculation of a lump sum payment if an employee is found to have a negative leave balance upon separation from employment; in such a case, the employee might find her final paycheck reduced accordingly.

A review of defendants' treatment of the following items is particularly useful in evaluating plaintiffs' FLSA claim.

A. Part-Day Docking

As evident from the time and leave regulations, plaintiffs must account for each hour (for employees of the City and the BOE) or half-hour (for employees of the HHC) of their workweek. Plaintiffs basically must allot any such unit of time away from work to their annual leave allowance or sick leave allowance, offset it against unusually long hours worked at another time, or take leave without pay. Plaintiffs cannot, for instance, simply slip away from work for an hour in order to take care of personal business. In fact, the City and the HHC regulations expressly provide for charging unexcused tardiness against an employee's annual leave allowance or treating it as leave without pay. City Regs. § 4.6; HHC Regs. § 1.0(E).[7]

B. Disciplinary Penalties

Plaintiffs are subject to disciplinary penalties, including suspensions without pay of one to four days or deductions from leave balances, for infractions other than those of safety rules of major significance. Defs.' Admis. No. 8. Plaintiffs are subject to penalties for a variety of infractions including, for example, insubordination, abuse of sick leave, refusal to report for drug

denied, 111 S. Ct. 785 (1991). But see Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992).

[7] Deductions for tardiness may also be viewed as disciplinary penalties, which are discussed immediately below. See Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279, 286 (7th Cir. 1993); Lacey v. Indiana State Police Dep't, 810 F. Supp. 244, 247 (S.D. Ind. 1992).

testing, conduct unbecoming, theft of agency property, and misuse of an agency car.

C. Court Attendance

Plaintiffs are authorized to attend court with pay and without using their accrued annual leave allowance if neither they nor anyone related to them has a personal interest in the case, the regulations specifically allow for paid leave in order for employees to attend court pursuant to a subpoena or court order. City Regs. § 8.0(c); HHC Regs. § 2.4(C). Thus, if one of the plaintiffs was absent from work in order to testify at a court proceeding in which she or someone related to her had a personal interest, the plaintiff would have to attempt to use her annual leave allowance, attempt to offset the time against unusually long hours worked at another time, or take leave without pay.

D. Military Leave

Plaintiffs may take military leave with pay for twenty-two work days or thirty calendar days each year. N.Y. Mil. Law § 242(5) (McKinney 1990) (incorporated into City Regs. § 8.1, HHC Regs. § 2.4(G), and BOE Regs. § 11). Beyond those periods, however, plaintiffs must seek to use their annual leave allowance, seek to offset the time against unusually long hours worked at another time, or take leave without pay.

II. Actual Deductions

Despite plaintiffs' vulnerability under the time and leave regulations to deductions from pay, actual deductions have rarely been made by defendants. In other words, plaintiffs appear for the most part to use their leave allowances or to account otherwise for absences rather than take leave without pay.

The parties dispute the extent to which deductions from pay have been made by defendants. Defendants contend that only two of the plaintiffs in this action have received such a deduction. The City did not pay John D. Brady for the last eight days of an approximately three-month period in 1991 while he was on active

military duty; Brady had exhausted his annual leave allowance. In addition, the HHC penalized Vito LaBella for misconduct concerning the use of a computer system by, inter alia, deducting $258.00 from his pay.

In contrast, plaintiffs contend that approximately ten of them have received deductions in pay. Given the procedural posture of this matter, I will proceed to review plaintiffs' claims acknowledging only the two deductions in pay identified by defendants. As will be shown, the Court's holding does not depend upon the occurrence of any actual deductions in compensation.

III. The FLSA Claim

A. Overview

Initially, the Court notes that the Supreme Court has found the application of FLSA's overtime requirements to state and local governments to be constitutional. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Accordingly, plaintiffs appear at first glance to be entitled to overtime compensation under FLSA at one and one-half their regular rate for hours worked in excess of forty hours each week. 29 U.S.C. § 207(a). Plaintiffs' claim fails, however, if the statutory exemption to FLSA's overtime requirements applies to plaintiffs. 29 U.S.C. § 213(a)(1).

This exemption relieves employers from FLSA's overtime compensation provisions in the case of "any employee employed in a bona fide executive, administrative, or professional capacity as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). Accordingly, the merits of plaintiffs' FLSA claim turn upon whether plaintiffs are "employed in a bona fide executive, administrative, or professional capacity."

Looking to the Department of Labor ("DOL") regulations, "executive," "administrative," and "professional" are defined in a manner such that plaintiffs fall within the exemption if they meet

a duties test and are compensated for their services on a salary basis. See Martin, 949 F.2d at 613; Abshire, 908 F.2d at 484; 29 C.F.R. §§ 541.1-3. The parties have stipulated that the job duties of plaintiffs satisfy the requirements for exemption under § 213(a)(1). Accordingly, the FLSA claim may be reduced to the issue of whether plaintiffs are compensated for their services on a salary basis. If so, then plaintiffs come within the exemption of § 213(a)(1) and their claim under FLSA fails.

Before embarking upon an analysis of whether plaintiffs are paid on a salary basis, the Court notes that the exemption of § 213(a)(1) is to be narrowly construed and that defendants bear the burden of demonstrating that plaintiffs fall within the exemption. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 456, (1960); Martin, 949 F.2d at 614.

B. Discussion

According to the DOL regulations,

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a Predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work. . . .
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. . . .

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. § 541.118 (emphasis added).

1. Defendants' Time and Leave Regulations

Inspection of defendants' time and leave regulations in view of the DOL's definition of "salary basis" exposes several issues which persuade the Court that plaintiffs are not compensated on a salary basis. The Court specifically finds that plaintiffs' compensation is "subject to reduction because of variations in the quality or quantity of the work performed."

At the outset, the Court notes that plaintiffs must account for absences from work lasting less than a day as a result of defendants' measurement of a workday in hour or half-hour segments. From this manner of accounting, a plain inconsistency surfaces between the defendants' time and leave regulations and the DOL's definition of "salary basis." The DOL regulations allow deductions for absences from work for a day or more for personal reasons or occasioned by sickness or disability. § 541.118(a)(2)-(3). A deduction for an hour or half-hour absence obviously is not "for a day or more," and the potential for a

deduction from plaintiffs' pay for absences of less than one work day under the defendants' time and leave regulations therefore operates in direct conflict with the DOL regulations.

This variance in defendants' time and leave regulations from the DOL's definition of "salary basis" was recently condoned by new regulations issued by the DOL. These "special provisions applicable to employees of public agencies" allow employees of a public agency, such as plaintiffs, to qualify for the exemption of § 213(a)(1) despite the docking of pay "for absences for personal reasons or because of illness or injury of less than one work-day." 29 C.F.R. § 541.5d. Prior to the promulgation of § 541.5d, the conflict between the defendants' time and leave regulations and the DOL regulations would have signalled that plaintiffs were not compensated on a salary basis. See Martin, 949 F.2d at 615 ("[A]n employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee."); Whitmore v. Port Auth. of New York & New Jersey, 907 F.2d 20, 21 (2d Cir. 1990); Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2d Cir. 1983); U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986 (the "1986 letter ruling"). In view of § 541.5d, however, the Court does not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption.[8]

Putting aside the issue of part-day docking, other obstacles prevent defendants from meeting their burden of proving the

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[8] Notably, if the Court were to rely upon this part-day docking and not proceed to find other support for its finding that plaintiffs are not paid on a salary basis, § 541.5d would not shield defendants from all liability in this action. The part-day docking would be a sufficient basis to disqualify plaintiffs from the exemption under § 213(a)(1) for the relevant period preceding the promulgation of § 541.5d. See Shockley v. City of Newport News, Nos. 92-1790, 92-1800, 1993 WL 217491, at *3 (4th Cir. June 22, 1993); Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 84 (6th Cir. 1993). As the Court finds plaintiffs not to be paid on a salary basis regardless of the part-day docking, dissection of plaintiffs' claims over time in relation to the promulgation of § 541.5d is unnecessary.

exemption under § 213(a)(1).[9] First, plaintiffs are subject to penalties for infractions of safety rules not of major significance. A more direct variance by defendants from the DOL regulations defining "salary basis" is difficult to fathom. See Shockley, 1993 WL 217491, at *5-6; Klein, 990 F.2d at 284-87; Lacey, 810 F. Supp. at 247-48; Service Employees Int'l Union, 784 F. Supp. at 1511; Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1371-72 (N.D. Ill. 1992). Compare Defs.' Admis. No. 8 (admitting possibility of penalties for infractions other than those of safety rules of major significance) and 29 C.F.R. § 541.118(a)(5) (restricting penalties to infractions of safety rules of major significance).[10]

In addition, plaintiffs who are absent from work in order to testify at a court proceeding in which they or someone related to them has a personal interest may have to take leave without pay under the defendants' time and leave regulations. This directly conflicts with the DOL's regulations disallowing deductions from compensation for absences caused by attendance as a witness. 29 C.F.R. § 541.118(a)(4). Similarly, defendants' limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay; under the DOL

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[9] Section 541.5d only affected reductions for absences of less than one day for personal reasons or due to illness or injury and left "[a]ll other aspects of the salary test . . . unchanged." 57 Fed. Reg. 37671; 57 Fed. Reg. 37673.

[10] When the DOL issued § 541.5d, it explicitly declined to distinguish public employers from private employers in regard to the ability to make pay deductions as penalties under § 541.118(a)(5). 57 Fed. Reg. 37674. The Corporation Counsel for the City of New York, O. Peter Sherwood, acknowledged this distinction in his September 16, 1992 statement before the House of Representatives Committee on Education and Labor Subcommittee on Labor Standards ("Statement"). Statement at 11 ("[Section 541.5d] failed, however, to address the effect of other deductions from pay under the salary basis test, such as a deduction for a disciplinary violation."); cf. Shockley, 1993 WL 217491, at *6 ("The power to reduce an employee's pay [as a disciplinary sanction] for failure to report an absence is inherent in the power to reduce an employee's pay for part-day and full-day absences for personal reasons, both of which were permissible following promulgation of § 541.5d").

regulations, deductions may not be made for absences caused by temporary military leave. Id.[11]

The manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of "salary basis" in regard to penalties and absences for attendance at court proceedings or due to military leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1).

2. "Subject to Reduction"

Defendants' primary response contends that something more than the theoretical imposition of pay deductions is required in order to disqualify plaintiffs from the exemption under § 213(a)(1), and actual deductions have only been made twice by defendants, in the cases of plaintiffs Brady and LaBella. Defendants would therefore have the Court fashion a standard by which plaintiffs and other public employees would only be prevented from meeting the exemption where there have been actual "regular and recurring" deductions in compensation.

Defendants recognize the existence of two schools of thought regarding whether actual deductions from compensation are necessary prior to finding that employees fall without the § 213(a)(1) exemption. In support of the course exhorted by defendants -- that deductions in compensation must be actual and regular and recurring in order to remove employees from the exemption -- defendants rely upon a line of decisions originating

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[11] Notably, plaintiffs are subject to deductions when they are absent for more or less than a day because of court attendance or military leave. As discussed above, docking of pay for absences of less than a day has been found inconsistent with compensation on a salary basis. See Martin, 949 F.2d at 615; Abshire, 908 F.2d at 486. The caselaw stating this principle appears specifically to concern absences for personal reasons or illness or injury under § 541.118(a)(2)-(3) (expressly allowing absences for "a day or more") and, as already related, has been nullified by § 541.5d as to public employees. As § 541.118(a)(4) addresses absences caused by attendance as a witness and temporary military leave and does not contain any language regarding the duration of the absence, the Court finds the deductions for absences as a witness or due to military leave at issue in this case to conflict with § 541.118(a)(4) regardless of the length of the absence.

outside the Second Circuit and upon an ambiguous paragraph found toward the end of the 1986 letter ruling.

As represented by defendants, courts outside the Second Circuit have held that something more than the possibility of a deduction in compensation is necessary in order to disqualify an employee from the exemption. See Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991) (pay not subject to reduction where no evidence of employees ever suffering reduction in pay); Harris v. District of Columbia, 709 F. Supp. 238, 241 (D.D.C. 1989) (refusing to rely upon "impermissible deductions [which are] less frequent than occasional"); District of Columbia Nurses' Ass'n v. District of Columbia, C.A. 87-1675, 1988 WL 156191, at *2 (D.D.C. January 28, 1988) (employees paid on salary basis where deduction "only in the occasional situation"); see also York v. City of Wichita Falls, Tex., 944 F.2d 236, 242 (5th Cir. 1991) (lack of evidence of docking of pay).[12] Contra Kinney v. District of Columbia, No. 91-7164, 1993 WL 179501 (D.C. Cir. June 1, 1993) (rejecting Harris and District of Columbia Nurses' Ass'n). Furthermore, the argument requiring "more than occasional" deductions appears to spring in part out of language contained in the 1986 letter ruling:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

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[12] Although defendants have cited York, the decision is not inconsistent with the cases reviewed below which favor plaintiffs' position that the existence of a policy of impermissible deductions meets the "subject to reduction" language of § 541.118(a). The York court recognized that it had no evidence before it of either actual deductions or a policy of docking pay. 944 F.2d at 242.

In contrast to these authorities, numerous courts have held that employee compensation is "subject to reduction" under § 541.118(a) if a policy of the employer provides for deductions disallowed by the DOL regulations for salaried employees regardless of whether such deductions have been made. See Kinney, 1993 WL 179501, at *4; Abshire, 908 F.2d at 487; Banks v. City of North Little Rock, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988) (no showing of actual deduction needed); Hawks v. City of Newport News, Va., 707 F. Supp. 212, 215 (E.D. Va. 1988) (employer's policy under attack under FLSA and whether policy has been applied does not alter policy itself); Persons v. City of Gresham, Or., 704 F. Supp. 191, 194 (D. Or. 1988) (immaterial that an instance of actual deduction not alleged); Knecht v. City of Redwood City, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (lack of actual pay reduction does not alter analysis); see also Shockley, 1993 WL 217491, at *2-6 (focusing upon defendant's policy); Michigan Ass'n of Governmental Employees, 992 F.2d at 85-86 (focusing upon policy but, finding policy ambiguous, looking to application of policy). Moreover, courts have explicitly considered the impact of the enigmatic paragraph in the 1986 letter ruling upon their analysis and, in the opinion of the undersigned, correctly interpreted the 1986 letter ruling so that, although an occasional unpermitted deduction which is inadvertent or unintentional would not change an employee's salary status, the frequency of actual deductions is immaterial to finding employees' compensation "subject to reduction" where the employer has a policy allowing deductions for unpermitted reasons. Abshire, 908 F.2d at 488; Harrison v. District of Columbia, Nos. 87-0809, 87-2275, 88-1028 and 88-3223, 1991 WL 104260 (D.D.C. April 16, 1991); Knecht, 683 F. Supp. at 1311; cf. Banks, 708 F. Supp. at 1024-25 (letter ruling relied upon by defendant but not provided to court). But see Harris, 709 F. Supp. at 241; District of Columbia Nurses' Ass'n, 1988 WL 156191, at *2 n.1. Even if the cited paragraph from the 1986 letter ruling had the significance urged upon the Court by defendants, the "letter ruling cannot override the express provisions of a Department of Labor regulation" in any event. Abshire, 908 F.2d at 488. In my opinion, "subject to reduction" when plainly read does not require actuality but intimates possibility and susceptibility and begs only

the question of whether a policy exists under which a deduction may occur.

Furthermore, unambiguous material generated by the DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. In its promulgation of § 541.5d, the DOL declined the suggestion of one commentator to "alter[] the regulations to require that an actual deduction of pay occur before the exemption is lost." 57 Fed. Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed. Reg. 37673.

Despite defendants' presentation to the Court of these two lines of cases in a form suggesting that the issue of how to interpret "subject to reduction" is one of first impression in the Second Circuit, the Court of Appeals for the Second Circuit has unmistakably embraced the reasoning contained in Abshire that employee compensation is "subject to reduction" where a policy exists under which employees may be docked pay even though deductions have not actually been made. Martin, 949 F.2d at 615-17. Given the reliance in Martin upon cases concerning public employees, including Abshire, and the absence of language in Martin distinguishing the treatment under FLSA of private and public employees, I do not view the fact that Martin concerned private employees to make its holding inapplicable here.

Furthermore, I see no basis for distinguishing the proper interpretation of "subject to reduction" under § 541.118(a) depending upon whether a case concerns § 541.118(a)(2)-(3) as in Martin or § 541.118(a)(4) - (5) as in the instant case. Defendants concur on this point. Defs.' Mem. at 21. Notably, precedent exists under § 541.118(a)(5) -- separate from the cases already cited for the Abshire-Martin interpretation of "subject to reduction" -- that whether or not penalties have actually been imposed is immaterial to finding that compensation is "subject to reduction." See Klein, 990 F.2d at 286; Lacey, 810 F. Supp. at 248 n.1; see also Service Employees Int'l Union, 784 F. Supp. at 1511. But see Atlanta Professional Firefighters Union, 920 F.2d at 805 (where no evidence of actual deduction, employee exempt despite

ordinance requiring decrease in compensation for arriving late or violating other regulations).

Finally, it shoud be noted that § 541.5d does not alter the Court's interpretation of "subject to reduction" under § 541.118(a). Although § 541.5d varies the analysis under § 541.118(a) in regard to when public employees' pay may be reduced "for absences for personal reasons or because of illness or injury of less than one work-day" and consequently overrules the holding of Abshire,[13] § 541.5d is silent as to the issue of whether "subject to reduction" requires an actual deduction to occur before an employee is no longer considered salaried under § 541.118(a). Accordingly, the Court disagrees with defendants' contention that § 541.5d overrules the interpretation of "subject to reduction" contained in Abshire and Martin.[14]

In view of the mandate to construe the exemption of § 213(a)(1) strictly, the Court finds that defendants have failed to meet their burden to demonstrate that plaintiffs fall within the exemption. Although § 541.5d prevents plaintiffs from being disqualified from the exemption based upon deductions for absences of less than one day of work, plaintiffs' compensation is "subject to reduction" for penalties not for infractions of safety rules of major significance and for absences caused by attendance as a witness or temporary military leave. Pursuant to § 541.118(a)(4)-(5), these deductions establish that plaintiffs are not paid on a salary basis and therefore are ineligible for the exemption from the overtime compensation provisions of FLSA.

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[13] If Martin had concerned public employees, its holding would also have been overruled by § 541.5d. As to the Second Circuit's decisions in this area, § 541.5d appears to be at variance only with Whitmore.

[14] The DOL is fully cognizant of the division of authority concerning whether "subject to reduction" under § 541.118(a) requires the existence of actual deductions in order to place an employee outside the exemption of § 213(a)(1). See 57 Fed. Reg. 37669. In asking this Court to require actual deductions, defendants in effect encourage the Court to embark upon a course which the DOL has, at least thus far, declined to follow. In view of Martin, the path on which this Court must travel is well-marked.

C. Defenses

Lastly, defendants assert three additional arguments in defense of plaintiffs' claim under FLSA which I shall briefly review.

1. Constitutionality

Defendants posit that Garcia establishes an "undue burden" test. Pursuant to the test put forth by defendants, lower courts are to issue relief where an undue burden exists as a result of failures by the political process to temper the effect of federal statutes upon state and local governments. Defendants' reading of Garcia is somewhat backward. Although the Court explores defendants' argument, the Court recognizes at the outset that its decision merely follows Garcia's holding that the application of FLSA to state and local governments is constitutional.

In Garcia, the Supreme Court found unworkable and inconsistent with established principles of federalism the traditional/nontraditional test which it had previously established in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976), for determining state immunity under the Commerce Clause. Although the Supreme Court did discuss in Garcia "the built-in restraints that our system provides through state participation in federal governmental action," 469 U.S. at 556, 105 S. Ct. at 1020, it did not fashion an "undue burden" test or any other test. "Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation." South Carolina v. Baker, 485 U.S. 505, 512, 108 S. Ct. 1355, 1361 (1988).

I perceive absolutely no basis in this matter for finding "extraordinary defects in the national political process" under Garcia-Baker despite defendants' assertion that "the political process has broken down." Defs.' Mem. at 25; see State of New York v. United States, 942 F.2d 114, 119-21 (2d Cir. 1991), aff'd

in part, rev'd in part, 112 S. Ct. 2408 (1992); EEOC v. State of Vermont, 904 F.2d 794, 802 (1990). To the extent that defendants complain about the political process, they focus upon the damages they face in this action – which they view as an undue burden and a result of failures in the political system – without pointing to any substantive defect in the political process itself. In other words, defendants emphasize effect and undue burden while turning a blind eye to cause and defects in the political process.

Having reviewed profuse submissions relating to revisions of the current law regarding the salary basis test, which involve, inter alia, the DOL, Congress, and state and local governments including defendants, it appears to me that the political process has operated proficiently despite the enduring existence of defendants' exposure to liability under FLSA. Indeed, the existence of § 541.5d and the redemption it affords in this very action to defendants' part-day docking policies provides concrete proof of the vitality of the political process. It remains to be seen whether the efforts of defendants and others in the political system can achieve what cannot be attained in this action -- the erasure of defendants' exposure to overtime compensation liability under FLSA in toto.

2. Administrative Procedure Act

Defendants' argument concerning the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 et seq. (1988), is greatly confused. In short, defendants appear to contend that failure to find plaintiffs to be compensated on a salary basis pursuant to § 541.118(a) violates the APA because of congressional intent that public employees qualify for the exemption under § 213(a)(1). Defendants provide no evidence of Congressional intent.[15] Defendants also contend that the DOL

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[15] Defendants seek to infer congressional intent from statements made by the DOL. Rather than delineate congressional intent, these citations illustrate the potential for revision of the DOL regulations as a result of the political process and the fact that grey areas exist as to what categories of employees should be exempt from FLSA's overtime compensation provisions. Cf. Kinney, 1993 WL 179501, at *3 (noting interaction between the DOL regulations and congressional

regulations are arbitrary and capricious in violation of the APA. In sum, defendants' arguments under the APA boil down to a restatement of their contention reviewed above that "subject to reduction" under § 541.118(a) should be interpreted to require actual deductions from employee compensation. Dressed under the APA, defendants' argument still fails.

3. Defendants' Good Faith

Defendants' last defense asserts that they are entitled to a good faith defense under § 10 of the Portal-to-Portal Act (the "Portal Act"), 29 U.S.C. § 259 (1988), which provides that "no employer shall be subject to any liability [under FLSA] if he pleads and proves[16] that the act or omission complained of was in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the DOL] or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged."[17]

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intent).

[16] Defendants did assert a Portal Act defense in their answer as an affirmative defense. However, I discern no disputed material fact and find the defense deficient as a matter of law drawing all reasonable inferences against plaintiffs. See Quinn v. New York State Elec. & Gas Corp., 621 F. Supp. 1086, 1089 (N.D.N.Y. 1985) ("summary judgment has been found to be an appropriate tool to dispose of cases involving a Portal-to-Portal Act defense"); see also EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982) (summary judgment rarely appropriate where state of mind is material issue); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658 (4th Cir. 1969) (affirming grant of summary judgment for plaintiff where defendant asserted a Portal Act defense).

[17] [T]he Portal Act defense requires the employer to establish three interrelated elements: (1) that its action was taken in reliance on a ruling of the [DOL], (2) that it was in conformity with that ruling, and (3) that it was in good faith.

Home Ins., 672 F.2d at 263; see also 29 C.F.R. § § 790.1-.22 (DOL interpretation of the Portal Act).

Initially, I note that defendants elaborate upon evaluations of FLSA's overtime compensation provisions made by them in the "Citywide Fair Labor Standards Act Committee" and in consultation with internal and outside counsel. Unless connected to a "written administrative regulation, order, ruling, approval, or interpretation" of the DOL, however, these evaluations are irrelevant under the Portal Act. See 29 C.F.R. § 790.13. Similarly, meetings with the DOL have no bearing upon the defense in the absence of a writing by the DOL. Although I have taken these consultations into account in my examination of the written materials upon which defendants claim reliance, I nevertheless find defendants' assertion of a Portal Act defense to fail.

The 1986 letter ruling is the first written material claimed by defendants to support a Portal Act defense in this action. As already discussed, however, this letter ruling does not sustain defendants' time and leave regulations (1) because it does not disqualify public employees from exemption under § 213(a)(1) where the employer has a policy allowing deductions for unpermitted reasons and (2) because the letter ruling in no manner overrides the plain "subject to reduction" language of § 541.118(a). See Abshire, 908 F.2d at 488; see also Harrison, 1991 WL 104260; Knecht, 683 F. Supp. at 1311. Furthermore, even if the 1986 letter ruling is viewed as requiring actual deductions to occur before exemption is lost, the letter ruling concerns deductions made for absences of less than one day and not deductions for court attendance as a witness, temporary military leave, and penalties not for infractions of safety rules of major significance -- the deductions which create the basis for liability in this case.[18]

Defendants also refer to a 1987 DOL letter ruling which stated a DOL nonenforcement policy in regard to deductions from

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[18] Decisions which find that actual deductions are not required in order to disqualify employees from the exemption under § 213(a) have in fact cited the 1986 DOL letter ruling for its holding that deductions for absences of less than a day are disallowed under § 541.118(a)(2)-(3) for salaried employees. Hawks, 707 F. Supp. at 214; Knecht, 683 F. Supp. at 1311.

public employees' compensation made for absences of less than a day for personal reasons or because of illness or accident; this letter ruling reflects part of the genesis of § 541.5d. U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 9, 1987 (the "1987 letter ruling"). As with the 1986 letter ruling, the 1987 letter ruling does not support a Portal Act defense because it does not speak to the types of deductions at issue in this action.[19] In his statement before Congress, the Corporation Counsel of the City of New York explicitly recognized that the 1987 letter ruling does not deal with penalties, attendance as a witness, and temporary military leave. Statement at 9. In addition, the 1987 letter ruling expressly states that it does not shield defendants from suits by employees, such as the instant action. See Kinney, 1993 WL 179501, at *1, *6; see also 57 Fed. Reg. 37668 (noting nonenforcement policy's inapplicability to employees in connection with the Portal Act).

Furthermore, "the Portal Act language, in good faith in conformity with,' precisely links the question of good faith to an act in conformity, and if there is no conformity, general good faith in other respects cannot save the day." Home Ins., 672 F.2d at 265. The material parts of defendants' time and leave regulations were in existence prior to the 1986 letter ruling. Defendants took no action "in conformity with" the 1986 letter ruling or the 1987 letter ruling, except for attempts to determine whether actual deductions had been made under their regulations. If defendants viewed the 1986 letter ruling and the 1987 letter ruling to require actual regular and recurring deductions in compensation before exemption would be lost, affirmative conforming action would be

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[19] Even as to the part-day docking addressed in the 1987 letter ruling, applicability to defendants is doubtful. The 1987 letter ruling, by its terms, applies "only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments [for absences of less than a day]." In their support, defendants cite the New York constitutional prohibition against municipal gifts of money or property to individuals. N.Y. Const. art. VIII, § 1. This constitutional provision does not, however, require defendants to deduct pay from plaintiffs for absences of less than a day. See Abshire, 908 F.2d at 489-90; see also City of Amsterdam v. Local 2825, Amsterdam Professional Firefighters, 494 N.Y.S.2d 180 (N.Y. App. Div. 1985); Taylor v. McGuire, 420 N.Y.S.2d 248 (N.Y. Sup. Ct. 1979).

expected from defendants, such as the issuance of regulations to restrict actual deductions.[20] Especially in view of the fact that neither letter ruling speaks to pay deductions for penalties, court attendance, or military leave, it is clear that defendants could not have relied upon the letter rulings for the maintenance of the time and leave regulations. See 29 C.F.R. § 790.14(b) (lack of conformity where employer assumes irrelevancy of varied circumstances).

Defendants essentially contend that they should not be found liable because of the flux surrounding FLSA's overtime compensation provisions for public employees after Garcia. The fundamental problem with this argument is that it effectively blocks public employees such as plaintiffs from receiving relief under FLSA until the political process irons out all of the wrinkles caused by the application of FLSA to public employees. Any uncertainty resulting from these political travails cannot form the basis for a portal Act defense.

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. Vol. 93, Part 4, Cong. Rec. 4390.

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[20] In Service Employees Int'l Union, defendant amended its ordinance so that "salaried" employees would not be subject to docking for periods of absence of less than one day. 784 F. Supp. at 1510. Plaintiffs have submitted evidence demonstrating a similar measure by the New York City Transit Authority. Kiok Decl. Ex. D. Obviously, this precise concern has been ameliorated by § 541.5d, but similar amendments could cure the other impermissible deductions in defendants' regulations. For instance, in Klein, defendant amended its disciplinary procedures so that no pay deductions would occur other than for infractions of safety rules of major significance. 990 F.2d at 282.

Quinn, 621 F. Supp. at 1091 (citing legislative history in connection with 29 C.F.R. § 790.15(a)).

Moreover, the shifting waters regarding FLSA's applicability to public employees post-Garcia have not been unnavigable. The first decision to require actual deductions in compensation for liability under FLSA, of which the Court is aware, was the 1988 decision District of Columbia Nurses' Ass'n; Knecht, issued in 1987, was the first decision, of which the Court is aware, to find that the absence of an actual deduction did not preclude FLSA liability. In view of the fact that defendants' time and leave regulations provided for the imposition of deductions in compensation prior to these decisions, defendants should not have merely stayed their course but should have shifted direction so that actual deductions would not be made until the debate was settled. See Kinney, 1993 WL 179501, at *6 ("split in judicial decisions" not reasonable basis for defendant's policy); 29 C.F.R. 790.17(h) (regulation, order, ruling, approval, or interpretation relied upon by employee must be valid at time of reliance).

In sum, plaintiffs should not be subject to a cut in pay because of defendants' misgivings about the political process. The Portal Act was not designed to protect defendants under the circumstances before the Court.

> Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.

29 C.F.R. § 790.2(a). Defendants' course of relief lies with the political process and/or modification of their time and leave

regulations; plaintiffs' course of relief lies with this action against defendants.[21]

IV. State Claim

As previously stated, plaintiffs' state claim asserts that plaintiffs whose regular workweek is thirty-five hours should receive overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code § 12-108.[22] Plaintiffs, however, point to no "statute, general, special or local" establishing thirty-five hours each week as "the maximum number of hours of employment;" accordingly, plaintiffs' state claim fails. I find plaintiffs' contention that § 12-108 can only reasonably be construed to provide overtime compensation for hours worked beyond an employee's regular workweek to be disingenuous in view of the unambiguous language of the statute. Cf. Corp v. Alexander, 460 N.Y.S.2d 674 (N.Y. App. Div. 1983) (plaintiff not fireman with statutory maximum of hours per year that maybe worked).

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[21] Another district court recently summarized the situation quite succinctly:

> This area of the law is currently churning, and federal courts issue often contradictory opinions on a daily basis. [Section 541.5d] only begins to address the types of problems faced by local governments because of their negligence (or unwillingness) to bring their policies into line with the FLSA, but we decline to extend the reach of [§ 541.5d's] forgiveness too far beyond its language. At some point public sector employers must be held to answer for their conduct.

Pautlitz, 781 F. Supp. at 1374.

[22] Notwithstanding the provisions of any other statute, general, special or local, the mayor may authorize the head of any agency to require any officer or employee in such agency or any class or group of officers or employees in such agency to work in excess of the maximum number of hours of employment prescribed for such officer or employee or class or group of officers or employees by any statute, general, special or local, provided that each such officer or employee shall be paid overtime compensation for such work at not less than his or her regular basic pay rate.

V. Conclusion

The Court finds that plaintiffs are entitled to unpaid overtime compensation for all hours worked in excess of forty hours each week under FLSA. The exemption under § 213(a)(1) does not apply to plaintiffs because they are not compensated on a salary basis according to the DOL regulations and controlling caselaw. This finding emanates from the defendants' time and leave regulations which subject plaintiffs' compensation to reduction for absences caused by attendance as a witness and by temporary military leave and for penalties not for infractions of safety rules of major significance. Plaintiffs' state claim fails because plaintiffs have failed to identify any statute which sets thirty-five hours each week as the maximum number of hours of employment.

Counsel for the parties shall appear at a conference before the Court on August 5, 1993 at 4:30 p.m. in order to address how to proceed in regard to the damage phase of this action.

SO ORDERED.

Dated: New York, New York
July 12, 1993

/s Loretta A. Preska
Loretta A. Preska, U.S.D.J.

JUDGMENT

U.S. DISTRICT COURT
FILED
MAY 12, 1995
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN, ET. AL.,

Plaintiffs,

- against -

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY SHCOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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91 Civ. 2197 (LAP)

JUDGMENT

This action came on for hearing before the Court, Honorable Loretta A. Preska, District Judge presiding, and the issues having been duly heard pursuant to cross-motions for

summary judgment, and opinions and orders on said cross-motions having been duly rendered on July 12, 1993 and October 6, 1994,

It is Ordered and Adjudged that the plaintiffs recover of the defendant City of New York, the sum of $10,656,349.18; that the plaintiffs recover of the defendant New York City Health and Hospitals Corporation, the sum of $2,573,677.80; that the plaintiffs recover of defendant Board of Education of the City School District of the City of New York, the sum of $76,896.88, in accordance with the amounts specified for each individual plaintiff named on the annexed list of individual plaintiffs; that the plaintiffs recover all amounts plus post judgment interest as provided by law, plus reasonable attorneys' fees and the costs of this action as provided in 29 U.S.C. § 216 (b).

Dated: New York, New York
May 9, 1995

/s Loretta A Preska
Loretta A. Preska
United States District Judge

DISTRICT COURT'S DENIAL OF RECONSIDERATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN, RALPH BISHOP, WILLIAM DWORKIN, FREDERICK EWALD, JOHN L. HENDERICKSON, RICHARD KREPLELA, ROBERT P. MCCARTHY, FRANK MEYER, ANTHONY PUNZI, and RONALD L. SAVITT, on behalf of themselves and all other employees similarly situated,

Plaintiffs,

- against -

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

ORAL ARGUMENT REQUESTED

DEFENDANTS' NOTICE OF MOTION FOR RECONSIDERATION AND TO VACATE THE JUDGMENT PURSUANT TO RULES 59 AND 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

91 Civ. 2197 (LAP)

PLEASE TAKE NOTICE that upon all the prior pleadings and proceedings had herein, defendants will move this Court at Room 12A, United States Courthouse, Southern District of New York, 500 Pearl Street, New York, N.Y., on the 26th day of June, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order vacating the final judgment in favor of plaintiffs pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure on the grounds that there has been an intervening change in the applicable law warranting reconsideration by this Court of its final judgment; vacatur of that judgment; and, entering a judgment in favor of defendants, and for such other and further relief as the Court deems just and proper

Dated: New York, New York
May 26, 1995

PAUL A. CROTTY
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 2-167
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(212) 788-0876

By: /s PBM
PATRICIA B. MILLER (PM0186)
Assistant Corporation Counsel

TO: Joan Stern Kiok
Attorney for Plaintiffs
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New York, N.Y. 10004-1898
(212) 747-1414

MEMO ENDORSED

the motion is denied in all respects.

SO ORDERED

/s Loretta A Preska
LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

October 5, 1995

JANUARY 15, 1986 LETTER RULING

Letter Ruling: January 15, 1986 (no number assigned)

This is in response to your letter of July 30, with enclosure, in which you request our opinion as to whether ___ Counties, in the State of ___ are compensating their salaried employees "on a salary basis" that is in accordance with the salary requirement contained in section 541.118 of Regulations, 29 CFR Part 541. You specifically want to know whether, under section 541.118, deductions may be made from the salaries of such employees for absences of less than a day. We regret the delay in responding to your inquiry.

Your letter states that in ___ counties virtually all employees are paid on a salary basis. The employees earn sick leave under the sick leave plans of those counties, and use the sick leave on the basis of the hours they work. In a telephone conversation with a member of my staff on October 20, you clarified your inquiry by stating that you request our opinion with regard to the salary basis of payment for employees who would otherwise qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as bona fide executive, administrative, or professional employees.

You state that where a salaried employee has accrued sufficient sick leave credits and, for example, misses four hours of scheduled work because of illness, the employee is charged for four hours of sick leave and his or her compensation is not affected. However, if such employee has exhausted all earned sick leave and misses four hours of scheduled work because of illness, the employee is docked for the four hours and his or her pay is reduced accordingly. You indicate that it may not be possible under ___ State law to advance sick leave to employees. You believe that other States have similar problems in paying such employees their full salaries when they work partial days.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive administrative, or professional capacity as those terms are defined in the appropriate sections of Regulations, 29 CFR Part 541. One requirement for exemption is that the employee be paid "on a salary basis" as discussed in section 541.118.

Deductions which may be made from an employee's compensation without affecting the employee's salary basis of payment are found in sections 541.118(a)(2), (3), and (5). Deductions from the salary of an otherwise exempt employee which would affect the salary basis of payment are found in sections 541.118(a)(1) and (4).

As stated in section 541.118(a)(2), deductions may be made from the salary of an exempt employee when the employee is absent from work for a day or more days for personal reasons, other than sickness or accident. As stated in section 541.118(a)(3), deductions may also be made for absences of a day or more days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of a day or more days may be made before an employee has qualified under such plan, policy, or made before an employee has qualified under such plan, policy, or practice and after the employee has exhausted the leave allowance thereunder. However, deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).

Therefore, in the example you provide where the employee is docked four hours and his or her pay is reduced accordingly, because the employee has exhausted his or her sick leave, the employee would not meet the criteria under 29 CFR Part 541 for exemption under section 13(a)(1) of FLSA.

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will be effective on April 15, 1986. Prior to that date, the Department of Labor (the Department) will issue regulations as may be required to implement this legislation. We have enclosed a summary of these amendments for your information.

We also wish to point out that on November 19 the Department published an Advance Notice of Proposed Rulemaking in the Federal Register (50 FR 47696) to obtain the views of the public on needed changes in Regulations, 29 CFR Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

We trust the above information will be of assistance to you.

Sincerely,

/s/ Herbert J. Cohen
Deputy Administrator

JANUARY 9, 1987 LETTER RULING

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 2 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) or less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions from absence(s) of less than a day for

personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator

JULY 17, 1987 LETTER RULING

Letter Ruling: July 17, 1987 (no number assigned)

This is in response to your letter of May 26 enclosing correspondence from ___ Secretary of the State of ___ Department of Employment Relations. ___ is specifically concerned with the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) to bona fide administrative and professional employees employed by the State of ___.

___ asks to what extent the State of ___ can require exempt administrative and professional employees, when they participate in collective bargaining activities, to substitute paid or unpaid leave for the time spent in such activities without affecting their status as exempt salaried employees. ___ states that it has generally been the position of the State of ___ that its employees who are members of their unit's bargaining team must cover time spent in bargaining during their normal working hours with paid leave time (i.e., vacation, compensatory time, etc.) or leave without pay. Bargaining sessions commonly take place over a period of a normal workday, but there are times in which the bargaining may last only a portion of a workday. In addition, bargaining sessions may last several days at a time but may not last a full workweek.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under FLSA must be paid a minimum of $3.35 per hour and overtime pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, 29 CFR Part 541, a copy

of which is enclosed. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the regulations.

It is our general position that time spent in union negotiations is hours worked for purposes of FLSA if the time occurs during regular working hours (section 785.42 of Interpretative Bulletin, 29 CFR Part 785, copy enclosed). Where time spent in union activities is to be counted as hours worked under FLSA, deductions from the salaries of bona fide administrative or professional employees would be inconsistent with the salary basis of payment and may not be made without defeating the exemption. Where the time spent in such activities during the employee's absence from productive work is not counted as worktime for the employer, deductions for such absences would come within the intent of the rule explained in section 541.118(a)(2) of the regulations which provides that deductions may be made when an employee absents himself or herself from work for a day or more (days) for personal reasons other than sickness or accident. Deductions for absences of less than a day, however, are not permitted under the regulations for any reason.

Based on the above, your constituents's questions are answered in the order presented in his letter.

Q.1

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities during the workday to substitute a partial day's paid leave or unpaid leave (i.e., a salary deduction) for the time spent in such activities without the employee losing his or her exempt status?

A.1

Generally, deductions for absences of less than a day are not permitted under the regulations for any reason. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week. In the case of State or local government employees, deductions may be made for absences of less than a day for personal reasons if the conditions outlined in the enclosed memorandum of January 9, 1987, are met.

Q.2

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities, such as contract negotiations, to substitute a full day or more (days) of paid or unpaid leave (i.e., a salary deduction of a full day or more (days) for a full day or more (days) spent in such activities) without the employee losing his or her exempt status?

A.2

Where the time spent in collective bargaining activities during the employee's absence from productive work is not counted as hours worked under FLSA, deductions for such absences would be permissible from the salary of an otherwise exempt employee for a full day or more (days) without the employee losing the exemption for that week.

Where such time is counted as hours worked under FLSA, deductions from the salary of an otherwise exempt employee for a full day or more (days) would be inconsistent with the employee's exempt status and may not be made without defeating the exemption. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.

Q.3

To what extent may an employer pay an administrative or professional employee on an hourly basis rather than a salary basis during the workweeks in which the employee chooses to engage in collective bargaining activities and pay the employee on a salary basis for all other workweeks without losing the employee's exempt status during the workweeks in which the employee is paid on a salary basis? ___ states to assume that the employee engages in collective bargaining activities for approximately 7 weeks over a 2-year period and that the employee would be paid as a nonexempt employee during these workweeks.

A.3

An employer may pay an otherwise exempt employee on an hourly basis rather than on a salary basis during workweeks in which the employee chooses to engage in collective bargaining activities.

It is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis.

It should be noted that it is also our position that an employee whose salary is computed on an hourly rate basis will be considered as employed "on a salary basis" if he or she is guaranteed a salary which is at least equal to the salary prescribed in the appropriate section of Regulations, Part 541, and if there is a reasonable relationship among the hourly rate, the regular or normal working hours, and the amount of the weekly guarantee.

MARCH 29, 1991 LETTER RULING

Letter Ruling: March 29, 1991 (no number assigned)

This is in reply to your letter requesting an opinion as to whether certain deductions from the salaries of Registered Nurses (RNs) would defeat the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

You state that your client is a hospital and in conformity with the provisions of a collective bargaining agreement (CBA), the RNs are considered to be salaried professional employees within the meaning of section 541.3 of Regulations, 29 CFR Part 541. You further state that the employees are paid biweekly, and that the hospital does not make deductions from their salaries for absences of less than one day in accordance with section 541.118 of the regulations. However, the CBA permits suspension without pay from one to five days should the RNs violate the hospital's or the State's rules governing health care employees. These rules address concerns of patient well-being, safety, and job performance. The rules require safe and competent performance of assigned duties as well as prompt and regular attendance when the RNs are scheduled for work.

In light of the above, you ask the following questions:

Q.1

May the hospital suspend a RN for disciplinary reasons without pay for one full week notwithstanding payment of a salary on a biweekly basis without affecting the employee's exempt status?

A.1

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity as those terms are defined in the appropriate section of the regulations. An employee may qualify as a bona fide professional employee if all the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met. One such test contained in section 541.118 of the regulations requires that an otherwise exempt employee be paid on a salary basis.

Section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work. Therefore, the answer to your first question is in the affirmative.

Q.2

May the hospital suspend an RN without pay for disciplinary reasons for periods of less than one week but for one or more full days without affecting the employee's exempt status?

A.2

Deductions which may be made from an employee's compensation without affecting his or her exempt "salaried" status are found in section 541.118(a)(2), (3), and (5) of the regulations. The only disciplinary type of deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in section 541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosive plants, oil refineries, and coal mines. This has also been construed to cover industrial security regulations promulgated by a government agency.

Disciplinary deductions made from the salary of an RN for violating rules relating to patient well-being and job performance

are not the type of deductions that would be permitted by section 541.118(a)(5) of the regulations. There is not enough information in your letter for us to determine if a violation of the hospital's or the State's safety rules are the type of "safety rules of major significance" for which disciplinary deductions may be made without affecting the exempt status of an employee.

Q.3

See our answer to question 2.

We trust that the above is responsive to your inquiry. If you have any further questions on this matter please do not hesitate to let us know.

/s/ John R. Fraser
Acting Administrator

DECEMBER 2, 1993 LETTER RULING

DEC -2 1993

Mr. E. Carl Uehlein, Jr.
Morgan, Lewis & Bockius
Counselors at Law
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Uehlein:

This is in response to your letter requesting an opinion as to whether the proposed pay-docking and disciplinary policies for salaried employees who qualify for the minimum wage and overtime pay exemption is in compliance with the provisions of section 541.118 of Regulations, 29 CFR Part 541. You state that your client is planning to issue a clarification of its policy which would permit workweek long disciplinary suspensions of exempt employees for reasons not necessarily constituting infractions of safety rules of major significance.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as described in the appropriate section of the Regulations, are met. One such test contained in section 541.118 of the Regulations requires that an otherwise exempt employee be paid on a salary basis.

The questions you raised are answered in the order presented in your letter.

Q.1. You ask whether your client's plan to issue a policy which would permit workweek long disciplinary suspensions of exempt employees for reasons not necessarily constituting

infractions of safety rules of major significance is permissible under the FLSA.

A.1. It would be permissibie to suspend an employee for an entire week without pay and not defeat the exemption, since section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work.

Q.2. You ask whether your client's proposed modification of its military leave policy to not compensate an employee for workweeks in which he or she undertakes no work for the employer because of military leave taken in excess of the authority's twenty-one day military leave in excess of the authority's twenty-one day military leave policy, where such absences result from order by military authorities for further training relating to the employee's military duties is in compliance.

A.2. Section 541.118(a)(4) of the Regulations states that deductions may not be made for absences of the employee on temporary military leave, although the employer may offset any amounts received by the employee as military pay for a part of the week against the salary due for that particular week without loss of the exemption. However, in any workweek in which the employee performs no work for the employer, the employer need not pay the employee any part of his or her salary.

Q.3. You also ask whether your client can treat voluntary military leave as "personal, voluntary" leave and not compensate exempt employees for days missed in excess of the twenty-one days allowed, where such days are taken as military leave without the express order or requirement of the employee's military duties.

A.3. There is nothing in the FLSA or the Regulations, Part 541, to prevent an employer from designating voluntary military leave as "personal, voluntary" leave and not compensable for days missed in excess of the twenty-one days allowed,

where such days are taken as military leave without express order or requirement of the employee's military duties.

Q.4. Finally, you ask whether your client can implement a policy to dock the pay of exempt employees who are absent from work for one or more full days for the purpose of taking part in Court proceedings where the employees are not under statutory or other legal compulsion to be present in Court (such as time spent on jury duty or under subpoena).

A.4. Section 541.118(a)(4) of the Regulations states that deductions may not be made for absences of the employee caused by jury duty or attendance as a witness, although the employer may offset any amounts received by the employee as jury or witness fees for a part of the week against the salary due for that particular week without loss of the exemption. However, it is our opinion that absences from work to attend Court proceedings where the employee is under no legal compulsion to be present in Court are absences for personal reasons. Deductions from an employee's salary may be made when the employee absents him or herself from work for a day or more for such personal reasons.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement

or order applying, or requiring compliance with the provisions of the FLSA.

Sincerely,

/s/ Maria Echaveste
Administrator